SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966 7

No. ~~1426~~ 195-

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BEN HERZBERG,
Hays, Sklar & Herzberg,
Attorney for Petitioner,
200 Park Avenue,
New York, New York 10017.

Of Counsel
DAVID W. PECK
BEN HERZBERG

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered February 10, 1967.

Citations to Opinions Below

The majority and dissenting opinions in the Court of Appeals, which affirmed the judgment of the District Court, are reported in 373 F. 2d 250 and printed in Appendix A. Petitioner applied for a rehearing before the Court of Appeals, and the opinion denying it, which has not yet been reported, is printed in Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered February 10, 1967. On February 24, petitioner filed a motion for reargument. After consideration, the Court ordered the United States Attorney to file a reply and only denied the application on March 31, 1967. On April 20, 1967, Mr. Justice Harlan extended the time for filing this petition to May 29. The mandate has been stayed by the Court of Appeals pending final disposition by this Court.

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

The Questions Presented

The petition presents two questions:

1. What should be the test of harmless error where a significant statement of a critical witness is withheld, contrary to the Jencks Act (18 U.S.C. §3500); and, more particularly, whether substantially the standard, recently announced by this Court in *Chapman* v. *California,* 386 U. S. 18 (1967), as to various constitutional errors, should be applied to Jencks Act violations. The *Chapman* test is similar to the one urged, as to denied Jencks Act material, by Mr. Justice Brennan (with the concurrence of the Chief Justice and Justices Black and Douglas) in the dissenting opinion in *Rosenberg* v. *United States,* 360 U. S. 367, 375-76 (1959). There is also a subsidiary question, whether the attempt by the court below to distinguish *Dennis* v. *United States,* 384 U. S. 855 (1966), has any validity.

2. Whether Judge Irving Ben Cooper's charge to the jury here, which was so sharply criticized in the dissenting opinion of Chief Judge Lumbard, can possibly be condoned under the harmless error doctrine applied generally in the federal courts. The determination of that question may also resolve the issue raised by Mr. Justice Harlan in his dissenting opinion in the *Chapman* case, 386 U. S. at 50, note 3.

This case was twice before the Court of Appeals. After Birnbaum's first conviction (before Judge Thomas F. Murphy), the Court of Appeals unanimously reversed [337 F. 2d 490 (1964)]. While the reversal rested largely upon the erroneous admission of prejudicial evidence, the Court also considered the refusal of the government to produce, under the Jencks Act, a prior statement by Leonhardt, the chief prosecution witness. As will appear, Judge Moore erred in holding that the refusal of that statement was not in itself reversible error. He in effect invited the district judge upon the second trial to exercise his "discretion" to make the statement available to the defense (337 F. 2d at 498).

Prior to the retrial Leonhardt died, and the second trial presented a situation analogous to the one in the recent *Dennis* case, 384 U. S. 855, 868, esp. note 13 (1966), where grand jury minutes had been withheld and one of the witnesses died between the first and second trials.

After Leonhardt's death and in advance of the second trial, the district court required the government to produce the statement, and after defense counsel had his first opportunity of reading it, he moved to exclude Leonhardt's testimony on the second trial upon the ground

that there had not been, on the first, the full opportunity of cross-examining him contemplated by the Jencks Act. Judge Cooper, before whom the second trial was had, denied the motion and Leonhardt's prior testimony was introduced (17-31a, 131-84a).[1]

In upholding the second conviction, and denying the subsequent motion for reargument, Judge Kaufman rested his rejection of the Jencks Act contention largely upon the assertion that the withholding of the statement on the first trial before Leonhardt's death was harmless error (A 29-30; B 3-5). In so doing, it will appear, he failed to respect the limitations upon the harmless error doctrine, especially as applicable to the Jencks Act.

The further question, whether the charge to the jury was, as Chief Judge Lumbard said, so prejudicial as to deprive petitioner of a fair trial (A 31, 39), was properly preserved by exceptions (480-84a, 405-09a).

Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions are the Fifth and Sixth Amendments. The statutes are the Jencks Act (18 U.S.C. §3500) and the federal harmless error statute (28 U.S.C. §2111). The related harmless error rule is Federal Rule of Criminal Procedure, 52(a).

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[1] The appendix method of appeal was used in the Court of Appeals and, pursuant to Rule 21(3) of this Court, the appendices were filed in this Court. We will designate the appendix of the petitioner (appellant below) by "a", and the appendix of the respondent by "b", following the page reference, and the few additional citations to the transcript of the trial filed in the Court of Appeals and in this Court, by "R" preceding the page reference. In contrast to the references to the appendix below, reference to the appendices attached to this petition are preceded by a letter, "A", "B", etc.

For convenience, we have included in appendix D the whole of Judge Moore's opinion on the Jencks Act point on the first appeal.

Statement

Birnbaum is a certified public accountant who enjoyed an excellent reputation prior to his conviction. His firm had prepared the income tax return for Leonhardt for 1955 and he was convicted after a jury trial of conspiring to bribe, and of bribing, Harold Simon, an agent in the Internal Revenue Service, in violation of 18 U.S.C. §371 (the conspiracy provision), §201 (the bribery section) and §2 (aiding and abetting). The indictment named the three principal witnesses who testified against Birnbaum—Alexander Guterma and Robert Eveleigh, as well as Leonhardt—as co-conspirators but not as defendants (7-12a).

1. The crucial issue upon the trial

There is no question that Guterma, Leonhardt and Eveleigh had bribed Simon, the agent, who was named as a defendant and pleaded guilty (1-2a). The sole question was whether, as Guterma and the other two asserted, Birnbaum had instigated the bribery, or otherwise had a part in it. Guterma, Eveleigh and Leonhardt had everything to gain from making false accusations against Birnbaum. After serving one term in jail, Guterma avoided a second term on another sentence, by implicating Birnbaum; Eveleigh, an alien, who had also served a sentence, secured a stay of his deportation for years by joining up with Guterma and testifying against Birnbaum upon the two trials; and Leonhardt, an admitted perjurer, avoided even a trial (94-97a, 292-93a, 296-97a, 398a). Birnbaum took the stand and the critical question on the trial was one of credibility, between him and his accusers (316a, 398a).

In describing "the facts" in the opinion, Judge Kaufman stated, as so often is done, only the prosecution's version (A3-4). While he said that the evidence was "overwhelming" against Birnbaum, his conclusion rested, as Judge Kaufman acknowledged, upon the testimony of Guterma, Leonhardt and Eveleigh (A 4).

2. The occasion for the Jencks Act statement; and its treatment during the first trial and appeal

After Guterma and the others had made their accusations against Birnbaum to the FBI and before there was any indictment, Leonhardt suggested to the FBI that he might carry on conversations with Simon and Birnbaum. The FBI supplied him with a concealed recording device, and he saw Simon first and Birnbaum two weeks later. On the first trial, Leonhardt mentioned that he had spoken to Simon; the transcript of that taped conversation was produced; and Leonhardt also testified orally to his conversation with Simon. In so doing he gave testimony against Birnbaum, which the Court of Appeals on the first appeal held was erroneous and prejudicial (337 F. 2d at 494-96). While asking Leonhardt about his conversation with Simon, the prosecutor avoided asking him anything about his talk with Birnbaum. Leonhardt testified in detail to other supposed conversations with Birnbaum, in which he asserted that Birnbaum had instigated the bribery and that, at the latter's suggestion, he had given Birnbaum $10,000 to give Simon (145-49a).

In view of the mission he had undertaken to secure admissions from Birnbaum and the criticalness of Leonhardt's testimony upon the trial, it was evident to defense counsel, as it would be to any experienced lawyer, that the transcript of the tape might be valuable for Leonhardt's cross-examination—for its bearing upon his credibility and possible direct contradictions. Counsel asked

for the transcript as Jencks Act material, but the prosecutor refused to turn it over, saying that since he had not inquired of Leonhardt about his conversation with Birnbaum, the transcript was not "related" to Leonhardt's testimony, within the meaning of the Jencks Act. After examining the transcript, Judge Murphy, who presided on the first trial, ruled with the prosecutor and apparently adopted his reasoning (R 2438-39).

The transcript of the Leonhardt-Birnbaum conversation was transmitted to the Court of Appeals under seal. While we had not seen it, we urged upon the first appeal (among other points) that there was no merit to the limited ground upon which Judge Murphy apparently acted; that under the authorities a statement is "related" if it bears upon the witness' credibility; and that the transcript here was related to Leonhardt's testimony, if, it appeared, in spite of the mission upon which he was engaged, that he did not dare accuse Birnbaum when they were face to face (D 1).

The opinion of Judge Moore on the first appeal is important because of its effect, among other things, on the opinion on the second appeal, upon which he also sat. Judge Moore recognized that a transcript or other statement bearing upon a witness' credibility is "related" to his testimony within the Jencks Act, but in the course of his opinion, which is not entirely clear, he seems to say that it is not enough that a statement falls within the Act to make it producible; that there is room for discretion on the part of the trial judge as to whether a statement would be useful for impeachment; and that the trial court's ruling is not reversible unless it is "clearly erroneous" (D 1-3, esp. at D 3). Judge Murphy did not place his refusal to turn over the transcript on any finding of fact; it rested, apparently, upon his conception of the law.

3. The production of the statement after Leonhardt's death; its nature and importance

After Leonhardt's death and before the second trial, the prosecution continued to oppose the delivery of the transcript of the Leonhardt-Birnbaum conversation, but Judge Tyler ordered it delivered (R 2229-37, 16a, 18-21a). After trial counsel for Birnbaum had examined the tape, he moved, as we have said, unsuccessfully to exclude Leonhardt's testimony prior to trial and again to suppress it during trial. Leonhardt's testimony was received and the transcript of the tape was introduced in evidence (17-31a, 127a, 130, 131-84, 348a—Govt. Exh. 27, reproduced at 350-95a).

The transcript of the Leonhardt-Birnbaum conversation, which occupied over an hour, runs 45 printed pages. We will not attempt to describe it in any detail, or furnish the background necessary for its full understanding which we did below in our principal brief (Applt. Br., CA, pp. 29-32). Instead, we will confine ourselves to pointing out how the transcript bore upon Leonhardt's credibility. Besides asserting on the trial that Birnbaum had instigated the bribery and that he had given Birnbaum $10,000 for Simon, Leonhardt testified that Birnbaum had devised the form of transaction, which gave rise to the tax question that Simon had cleared in examining Leonhardt's return, and that Birnbaum had dealt with Simon at every step (135-36a, 144-49a). In the course of the prior taped conversation with Birnbaum, Leonhardt, who was a member of the bar, had every opportunity of bringing up and testing Birnbaum about various aspects of his asserted participation. For instance, Birnbaum told Leonhardt that he never understood the transaction, it having been devised by Leonhardt's attorney, and that he did not recall Simon well (131a, 372a, 368-69a, 350a). If what Leonhardt said on the first trial was true, you would

expect him to have made some caustic reply to those statements, but the transcript shows that he remained mute. And in his summation on the second trial, the prosecutor admitted (423a):

> "I am hard pressed to answer it at times, why didn't Leonhardt out and out say, 'Saul, what about the $10,000 I gave you in 1957'?
>
> Why didn't he [Leonhardt] do that, why didn't he come out and say it? That is a hard question. I don't know."

Not only did the transcript bear sharply upon Leonhardt's credibility, but there was direct contradiction between what he said upon the trial and what he admitted in the course of his prior conversation with Birnbaum (compare 135-36a with 368-69a, 372a). If anything more is necessary to point up the importance of the transcript withheld on the first trial, it is sufficient to add that on the second trial, the jury during its deliberations called for the transcript (488a).

4. The charge

Although the case had been competently tried and summed up by both sides, Judge Cooper discussed—in fact reargued—the factual issues in the course of a charge that continued for two hours and occupies 56 printed pages.[1] Judge Cooper did not limit himself to his text, at points talking extemporaneously (A 39), and, as Chief Judge Lumbard said in his dissenting opinion, the charge was of "the stuff of which prosecutors make their summations; it ought not to be the stuff with which judges charge juries" (A 35).

[1] On the first trial, the judge had covered all the necessary points in 19 pages (A 32).

In his dissenting opinion, Chief Judge Lumbard describes certain of the many objectionable parts of the charge (A 33-39). In the majority opinion, Judge Kaufman sought to pass them off. In one particularly objectionable portion of the charge, Judge Cooper had said to the jury (473a):

> "The government contends, or at least this is my suggestion, that the defendant was up to his ears in graft and corruption, with the Denver deal[1], with the various transactions from which he made a profit; that they were shady in character, he well knew, and this was long before Simon made his appearance on the scene."

The government had made no contention that there was graft or corruption in the "Denver deal". Nor was there any evidence that Birnbaum had made profit from other "transactions". Referring to this part of the charge, Judge Kaufman said he did not believe it was prejudicial because it came so late in the instructions to the jury (A 25-26). We can think of no reason why a highly objectionable statement should be less prejudicial because it comes immediately before the jury retires for its deliberation. In fact, the situation became so bad during the course of Judge Cooper's charge, that after defense counsel stated his objections (out of the presence of the jury), the prosecutor urged Judge Cooper to modify his charge, but he did not change a word (483-85a, 488a).

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[1] "Denver deal" refers to the transaction involved in Leonhardt's tax return. He had reported his profit as a long-term capital gain and the Government contended that Simon was bribed to overlook the possibility that it should have been treated as a short-term gain (54-56a, 108a, 410a).

Reasons for Granting the Writ

While we think it is clear from a careful reading of the Jencks cases in this Court that the room for the application of the harmless error doctrine is very limited, this Court has not so declared in any prevailing opinion, and some of the courts below, as well as the federal prosecutors, need, as will appear, a clear mandate on this point. None of the situations which are frequently urged to minimize the error in Jencks Act violations exists here. In disregarding the applicable standard of harmless error in Jencks cases, the court below also acted at variance with *Dennis,* 384 U. S. 855. And the errors in the charge to the jury, upon which the court below divided, furnish additional grounds for review.

1. The applicable harmless error standard in Jencks cases is clearly suggested by *Rosenberg* and *Chapman*

While it might be helpful, in pointing up the prevailing view of this Court, to trace the development from the original *Jencks* case, 353 U. S. 657, 668-69 (1957), through *Palermo,* 360 U. S. 343 (1959), *Rosenberg,* 360 U. S. 367 (1959), *Clancy,* 365 U. S. 312 (1961), *Scales,* 367 U. S. 203, 257-58 (1961), *Killian,* 368 U. S. 231, 243-44 and 275-77 (1961), and *Dennis,* 384 U. S. 855 (1966), it is principally *Palermo, Rosenberg* and *Dennis* that point the way.

In *Palermo,* the first case decided after the adoption of the Act itself, Mr. Justice Frankfurter—writing for himself and Justices Clark, Harlan, Whittaker, and Stewart—laid down guidelines to be followed in the application of the Act, with which the Chief Justice, and Justices

Brennan, Black and Douglas disagreed. Mr. Justice Frankfurter wrote (360 U. S. at 353):

> "Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts."

Taking the contrary view, Mr. Justice Brennan stated for the minority (360 U. S. at 364, note 4):

> "Of course if the memorandum [the prior statement] had been one falling within the statute, I need hardly add that the judge would have had no discretion to refuse to order its production to the defense, in the light of the statute's affirmative command."

In *Rosenberg,* decided later in the same year, there was a division within the Court whether the information elicited by the defense on cross-examination was the equivalent of the withheld Jencks Act statement. In writing for the majority, Mr. Justice Frankfurter said that while an "appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents", the same information, he wrote, had been otherwise obtained and the error was "clearly" harmless (p. 371). In dissenting for the Chief Justice and Justices Black, Douglas and himself, Mr. Justice Brennan took issue with the assertion that the information elicited on cross-examination was the equivalent of the withheld statement, and stated the harmless

error doctrine that he felt should be followed, saying (360 U. S. at 375-76):

> "* * * when the defense has been denied a statement producible under the statute, an appellate court should order a new trial unless the circumstances justify the conclusion that a finding that such a denial was harmful error would be clearly erroneous."

Mr. Justice Brennan went on to say that "only a very strict standard is appropriate for applying the harmless error doctrine" in Jencks Act cases, and he indicated something of the permissible range by three examples—where the defense received from another source information clearly as valuable, for purpose of cross-examination, as the withheld statement; where the testimony of the witness whose statement was withheld was unimportant; or where the witness' statement is "wholly void of possible use for impeachment" (pp. 376-77).

In *Dennis,* so recently decided, the principal witnesses for the prosecution had testified before the grand jury and the Court held, by analogy to Jencks cases, that the defendants were entitled to examine the grand jury minutes (covering the witnesses' testimony), for purpose of cross-examination. Mr. Justice Fortas wrote for a unanimous court that the defendants "were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination" (384 U. S. at 875). Three of the witnesses were still alive, but the fourth, Mason, had died after the first trial and as to him, Mr. Justice Fortas stated (p. 868, note 13):

> "Since the omission to require production of Mason's grand jury testimony with a view to

> impeachment can no longer be remedied, his trial testimony, under our holding herein, is no longer available to the Government in the event petitioners are retried."

Referring to Jencks cases, Mr. Justice Fortas added (p. 875):

> "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

The statement repeatedly made by this Court in language similar to Mr. Justice Fortas, that it is not for the trial or appellate court to say how useful a statement producible under the Jencks Act may be for cross-examination (*Jencks,* 353 U. S. at 668-69; *Rosenberg,* 360 U. S. at 371; *Clancy,* 365 U. S. at 316; *Scales,* 367 U. S. at 258), necessarily implies that there is a limited scope for the harmless error doctrine in the appellate court. The proper standard to be applied in view of that limited scope is, we submit, stated in Mr. Justice Brennan's dissent in *Rosenberg* (pp. 12-13, *supra*). The standard urged by him there is, as we have suggested, not substantially different from the test that this Court so recently applied to some constitutional errors in *Chapman.* There, Mr. Justice Black said that before such error "can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt" (386 U. S. at 24). Moreover, it is proper that much the same standard be applied to the Jencks Act, which, as Mr. Justice Brennan pointed out in *Palermo,* lies close to the "commands of the Constitution" (360 U. S. at 362-63).

After we have pointed up the respects in which the Court of Appeals here departed from the applicable standard, we will develop the situation in the other circuits.

2. The court disregarded the proper test of the harmless error doctrine and its decision is also inconsistent with *Dennis*

While the transcript was a record of a conversation between Leonhardt and the defendant Birnbaum, its potential use was for the cross-examination of the former, the principal witness for the prosecution. That the conversation was with the defendant is of no significance. That was the situation, for one, in *Clancy* v. *United States*, (*supra*—365 U. S. 312). Nor can there be any question under *Rosenberg* (360 U. S. at 371), as well as *Clancy*, that if the transcript of the tape did no more than go to the credibility of Leonhardt, it was "related" to his testimony on the trial and producible under the Jencks Act.[1]

[1] We do not think the Solicitor General will urge that the transcript did not fall within the definition of a "statement" within section (e) of the Act (E 3). In *United States* v. *Sopher*, 362 F. 2d 523, 525-26 (CA 7, 1966), cert. den. 385 U. S. 928, Judge Schnackenberg did suggest, as one ground for dismissing the Jencks Act contention there, that a tape of a reported conversation between a defendant and a witness who was working for the FBI did not fall within the section, because the witness was not an "agent of the Government". But on the application for certiorari, the Solicitor General pointed out that Judge Schnackenberg's statement was unnecessary to the decision and that this Court did not need to consider the suggested ground because the same information was given to the defense in two other forms (Br. for the U. S., p. 15 and Note 10).

Judge Schnackenberg construed the Act far too narrowly. At one time, there was a question as to whether a memorandum made by an agent-witness was producible under the statute and the Solicitor General very properly took the view that by delivering the memorandum to his superior, the agent adopted the memorandum within the meaning of clause 1 of section (e) [Br. for the U. S., pp. 26-27, in

True, the transcript was produced on the second trial and admitted in evidence, but that was hardly the equivalent of having the transcript available for the cross-examination of Leonhardt when he was still alive. A skillful lawyer on cross-examination could have confronted Leonhardt in various ways with the fact that during an hour-long conversation, which he had arranged for the purpose of seeking to obtain admissions from Birnbaum, he did not once suggest that Birnbaum was in any way engaged in the bribery. And counsel could have dwelt upon the other inconsistencies, such as between Leonhardt's statement on the trial that he relied on Birnbaum for tax advice as to the transaction reported in his return and his admission, during his prior conversation, that he had relied upon his attorney (135-36a, 368-69a, 372a). Then too it would have been known whether there was anything to the explanation offered by the prosecutor on the second trial, that Leonhardt might not have brought up the subject of the bribery in the course of the conversation, because he thought Birnbaum was on guard (423-24a). The same argument that the transcript would be available on a retrial could have been made in *Dennis*.

On the motion for reargument, the court below suggested first, in a portion of the opinion that we at least

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Needleman v. *United States*, 362 U. S. 600 (1960)]. In the same way here, Leonhardt must be taken, under clause 2, as having made and approved the statement contained on the tape to an agent of the FBI when he turned over the tape to him.

In his opinion, Judge Moore recognized that the transcript constituted a "statement" within the terms of the Act (D 1), and the government never contended the contrary. But if there is any question that the transcript falls within the Act, its denial would present questions under *Brady* v. *Maryland*, 373 U. S. 83, 86-87 (1963) and *Giles* v. *Maryland*, 386 U. S. 66 (1967).

find hard to understand, that Judge Murphy may not have committed any error in refusing the production of the tape in the first instance (B 2-3). As we have seen, there is no question that the transcript was related to Leonhardt's testimony and producible under the Act; any suggestion to the contrary in the opinion on the motion for reargument is not even in keeping with Judge Moore's position on the first appeal.

Continuing, the court said that if there was error, it was harmless and for that conclusion, the court relied on two circumstances.

First, it suggested that Birnbaum was a party to the conversation with Leonhardt and that his recollection of it gave him the same information as the transcript would (B 3). In that way, the court apparently sought to bring this case within the limited exception of *Rosenberg,* 360 U. S. 367, and *Killian,* 368 U. S. 231, 243-44, 276-77. When the argument is made that the defendant received the same information from another source, the question always is, as Mr. Justice Brennan pointed out in his dissent in *Rosenberg* (360 U. S. at 376-77), whether the information is the *equivalent* of the withheld statement for the purpose of cross-examination. The conversation between Leonhardt and Birnbaum took place in October 1961, two years before the trial (47a, 2a), and it is idle to suggest that Birnbaum or anyone else could possibly recall the conversation with anything approaching the accuracy of a transcript.[1] With a transcript of 45 printed pages, defense counsel would have had something solid with which to cross-examine Leonhardt. How can it be maintained that an uncertain recollection of two years

[1] Even the jury, who heard the transcript only a few days before, asked to see it during its deliberation (488a-Ex 27).

before is the equivalent of a transcript of an extended conversation? If it could be said that a possible recollection is the equivalent of the statement, there never could be error in denying a defendant a copy of his own statement. In *United States* v. *Remington*, 191 F. 2d 246 (CA 2, 1951), the court held that *Remington* was entitled to see the minutes of his own testimony before the grand jury as to which he was charged with perjury, and Judge Swan said, "His memory of what he said is no adequate substitute for the minutes themselves" (p. 251). See also Mr. Justice Brennan's dissent in *Rosenberg* where the claim was made that the information obtained was the equivalent of that withheld for the purpose of cross-examination (360 U. S. at 376).

Second, the court suggested that Birnbaum deliberately did not cross-examine Leonhardt as to the conversation, and that his counsel on the first trial waited until his summation to say to the jury that Leonhardt had testified to his taped conversation with Simon but had said nothing about his conversation with Birnbaum, and that if, in that conversation, Leonhardt had charged Birnbaum with participation and he had admitted it, the conversation would have been brought out by the prosecution (B 4-5, Rec. on 1st appeal, SM 1542-44).[1]

There is every good reason why counsel for Birnbaum on the first trial should have hesitated to have asked Leonhardt about the conversation. With the transcript denied, he could not possibly have any confidence that Leonhardt would have confessed that he did not bring up the subject during his conversation with Birnbaum and even if we were to assume that Birnbaum two years later could have recollected the details of the conversation

[1] For the purpose of such material as we have just referred to, we had the record on the first appeal certified and filed with the Clerk.

and had reported them to his attorney, his counsel could not have had any confidence that upon his cross-examination Leonhardt would have admitted to the inconsistencies between his testimony on the trial and his prior statements to Birnbaum (pp. 8-9, 16, *supra*). No one can seriously suggest that the slight argument made by defense counsel on the first trial, consisting of a few pages in a summation running some 63 pages, was the equivalent of the production of the transcript of 45 pages (compare Rec. on 1st appeal, SM 1542-44, with 350-95a). No matter how it is put, it is clear that what the court below was doing in saying that the error was harmless is exactly what this Court has frequently warned against—a speculation as to how effectively a withheld statement could have been used.

The exposure of the argument that Birnbaum's recollection of what happened two years before is the equivalent of the transcript disposes also of the contention, made in a footnote in the opinion on the motion for reargument, that Birnbaum's recollection distinguishes the present from the *Dennis* case (B 4, note 1).

3. The decision here is in conflict with the decisions in other circuits, as well as with rulings of other panels in the Second Circuit

In holding on the first appeal in this case that Judge Murphy's refusal to require production of the statement was not a ground for reversal, unless his determination was "clearly erroneous", Judge Moore applied the rule which is applicable when the trial judge makes a determination of fact and not one of law or a mixed finding of both. It is one thing to suggest that the trial judge has an advantage over an appellate court in determining a fact because he sees the witnesses, and its quite another to suggest that he is a better judge of the law. The clearly erroneous doctrine only applies to determinations of fact [see *Campbell* v. *United States,* 373 U.S. 487, 493 (1963); 5 Moore, *Federal Practice* (2d ed.) par. 52.03 [2], pp. 2630-31].

In *Cardillo,* 316 F.2d 606, 615-16 (CA 2, 1963), cert. den., 375 U. S. 822, upon which Judge Moore relied in his opinion on the first appeal in Birnbaum, it does not appear that the lower court's determination did not rest upon a determination of fact and, in seeking certiorari, the petitioner did not intimate the contrary (appl. pp. 18-19). There is no suggestion here that there was a question of fact upon which Judge Murphy could have rested his determination; most likely he acted upon the erroneous legal contention made by the prosecutor (p. 7, *supra*).[1] To apply the "clearly erroneous doctrine" to Jencks Act cases, except in a very limited area where its application depends upon a determination of fact, is to turn the tables upside down.

In a case decided shortly after Judge Moore's opinion on the first Birnbaum appeal, another panel in the Second Circuit appears to have rejected the proposition upon which his opinion rested. In *United States* v. *Ellenbogen,* 341 F. 2d 893 (CA 2, 1965), the lower court had refused to make available an FBI report, which contradicted some testimony given by the witness upon the trial. In seeking to overcome the error, the government argued on appeal that, under *Cardillo* and the first *Birnbaum* opinions, the question whether the report "related" to the testimony was for the trial judge in the first instance and that his determination would not be disturbed in the absence of a showing that it was clearly erroneous (Govt. Br. in *Ellenbogen,* pp. 32-34; Govt. Pet. for Rehearing, pp. 9-10).

After declaring that the statement in question was "related" to the witness' testimony, Judge Marshall, now Solicitor General, said (p. 894) that there was "no room

[1] Judge Moore did not discuss the ground upon which Judge Murphy apparently acted, but seems to say that a trial judge has discretion to withhold a statement, which in all respects meets the conditions of the Act, if he thinks it would be ineffective for cross-examination (p. 7, *supra*).

for the trial judge, nor for us, to speculate as to how useful this statement will be for purposes of cross-examination or how important such cross-examination will be to defendant's case * * *". He then disposed of the reliance on *Cardillo* and *Birnbaum* by saying that the statements there were merely "general language", and that "both of these cases expressly recognize the principle that prior statements that relate 'generally to the events and activities testified to' must be produced" (p. 894).

It seems obvious that, in writing for himself and Judges Friendly and Hays, Judge Marshall was, in polite language, rejecting the ground upon which Judge Moore went off on the first Birnbaum appeal. And that would have ended the matter but for the fact that, upon the application for reargument on the second appeal, a different panel, of which Judge Moore was one, said that *Ellenbogen* in no way modified the first Birnbaum opinion (B 2).

The situation in other circuits can be briefly stated. While the standard followed in some is uncertain, it can be fairly said that the test applied in the Court of Appeals for the District of Columbia and in the Third and Eighth Circuits is directly opposed to that in the Second in this case and is in conformity with a limited application of the harmless error doctrine [*Williams* v. *United States,* 338 F. 2d 286, 289-91 D.C. Cir., 1964); *United States* v. *McCarthy,* 301 F. 2d 796, 799-801 (CA 3, 1962); *United States* v. *Meisch,* 370 F. 2d 768, 771-72 (CA 3, 1966); *Lewis* v. *United States,* 340 F. 2d 678, 682 (CA 8, 1965); *Banks* v. *United States,* 348 F. 2d 231, 233-36 (CA 8, 1965)].

It might be thought that by this time the federal prosecutors would no longer risk reversal by withholding prior statements of witnesses that might fall within the Jencks Act, but as Judge Friendly noted with "wonder", the old

attitude still persists (*United States* v. *Borelli*, 336 F. 2d 376, 393 (CA 2, 1964), cert. den., 379 U. S. 960).[1]

4. The charge to the jury went beyond any conceivable limits of the harmless error doctrine

From what we have said in our brief description of the charge (pp. 9-10, *supra*) and the fuller statement in Chief Judge Lumbard's dissent (A 31-39), there can hardly be any question that the charge was prejudicial. Judge Cooper unwittingly identified himself with the cause of the prosecution and his charge was a one-sided, inaccurate statement of the facts. Upon the cross-examination of Guterma, Leonhardt and Eveleigh, the defense brought out the crimes they had committed (74-77a, 89-97a, 212-16a, 292-93a), and, in charging the jury, Judge Cooper turned that evidence against Birnbaum in part and, in effect, invited the jury to find him guilty by association. He carried the charge to an intolerable length, with increasing emotional tension and the obscuring of applicable legal principles. Even the prosecutor asked the judge to modify the charge (p. 10, *supra*). In the words of Chief Judge Lumbard, "the trial court's charge to the jury went so far beyond permissible limits of comment that it denied Birnbaum the fair trial to which every defendant is entitled" (A 31).

It would be desirable, we suggest, for this Court to remind the lower tribunals that the charge to the jury is probably the most important function performed by the trial judge, that a fair and restrained charge is essential to a fair trial, and that no form of the harmless error doctrine may be pushed to condoning a charge like

[1] A count of the number of reported cases in which the courts of appeals had to apply their concepts of the harmless error rule in Jencks Act cases within the last three years, 1964-66, disclosed at least 19 such instances.

this. In any number of respects, the judge disregarded principles that should govern a charge.[1]

The petition for certiorari should be granted.

Respectfully submitted,

BEN HERZBERG,
Hays, Sklar & Herzberg
Attorney for Petitioner
200 Park Avenue
New York, N. Y. 10017

DAVID W. PECK
BEN HERZBERG
Of Counsel

May 26, 1967

[1] It is doubtful whether a judge should sum up the facts at all if, as here, there have been summations by capable counsel, but if he is going to do so, he should avoid animated argument; the charge must be evenly balanced; "repetitious and unnecessarily long charges are confusing"; and, except in rare instances, judges should not charge the jury extemporaneously and risk prejudicial inaccuracies [*United States* v. *Kahaner*, 317 F. 2d 459, 479, 480 (Friendly, J., 1963), cert. den. 375 U. S. 835; *Allison* v. *United States*, 160 U. S. 203, 217 (1895); *Quercia* v. *United States*, 289 U. S. 466, 470 (1933); *United States* v. *Persico*, 349 F. 2d 6, 8 (CA 2, 1965); *Martin* v. *Los Angeles Turf Club Inc.*, 39 Cal. App. 2d 338, 342-43, 103 P. 2d 188, 190 (1940)].

APPENDIX A

Opinion of Court of Appeals

on the second appeal

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 88—September Term, 1966.

(Argued October 25, 1966 Decided February 10, 1967.)

Docket No. 30511

UNITED STATES OF AMERICA,

Appellee,

—*v.*—

SAUL I. BIRNBAUM,

Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and KAUFMAN, *Circuit Judges.*

Appeal from a judgment of the District Court for the Southern District of New York, Irving Ben Cooper, *J.*, convicting appellant, after a jury trial, of conspiring to bribe, and of bribing an agent of the Internal Revenue Service, in violation of 18 U. S. C. §§371, 201 and 2.

Affirmed.

DAVID W. PECK (Ben Herzberg, Howard T. Milman, Frederick F. Greenman, Jr., Hays, Sklar & Herzberg, New York, N. Y., of counsel), *for appellant.*

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PETER E. FLEMING, JR. (Robert M. Morgenthau, United States Attorney for the Southern District of New York; Douglas S. Liebhafsky, Michael W. Mitchell, Assistant United States Attorneys, of counsel), *for appellee.*

KAUFMAN, *Circuit Judge:*

This Court is no stranger to this case. In September 1963, Saul I. Birnbaum was convicted by a jury of bribing and conspiring to bribe an Internal Revenue Agent. On appeal we reversed his conviction and ordered a new trial. On remand, a jury for the second time found the appellant guilty. Birnbaum now urges us to reverse this second conviction, claiming that the judge's charge to the jury was prejudicial and that certain evidence was improperly admitted.

The indictment, filed on November 3, 1961, contained four Counts. The first charged that Birnbaum, a certified public accountant, and Harold Simon, an Internal Revenue Agent, had conspired with Alexander L. Guterma, Robert J. Eveleigh, and Robert C. Leonhardt, to violate various sections of the Criminal and Internal Revenue Codes dealing with bribery.[1] Guterma, Eveleigh and Leonhardt were named as co-conspirators but not defendants.

Counts Two and Four named Simon alone, and charged him with violating 26 U. S. C. §7214(a)(2) by accepting a bribe in return for a favorable determination regarding the tax returns of Guterma and Leonhardt. The third Count asserted that Birnbaum only had violated 18 U. S. C.

1 The count referred to 18 U. S. C. §201 (offer to officer), 18 U. S. C. §202 (acceptance or solicitation of officer), and 26 U. S. C. §7214 (unlawful acts of revenue officer). This appeal does not concern itself with an interpretation of those sections.

§§2 and 201 by giving cash and securities to Simon for the purpose of influencing his determinations.

Simon pleaded guilty to Counts One, Two and Four, and was sentenced to 18 months' imprisonment on each of the latter two Counts, and a year and a day on the first Count, the sentences to run concurrently. He was also fined $2000 on Count Four.

Birnbaum entered a plea of not guilty, and in September 1963 he was tried before Judge Thomas J. Murphy and a jury. Found guilty on both Counts in which he was named, Birnbaum was sentenced to 18 months' imprisonment on each, the sentences to run concurrently. On appeal, however, we reversed his conviction and remanded the case for a new trial, principally because of the erroneous admission of certain evidence. *United States* v. *Birnbaum*, 337 F. 2d 490 (2d Cir. 1964).

Birnbaum's second trial commenced in February 1966 before Judge Irving Ben Cooper and a jury. The prime issue was whether Birnbaum was implicated in the bribery of Simon, and once again a verdict of guilty on both Counts was returned. Judge Cooper imposed a sentence of one year on each Count, the terms to run concurrently. It is from this judgment that the present appeal is taken.

I.

It is not possible to explore adequately Birnbaum's numerous claims of error without a thorough understanding of the complicated transactions underlying the alleged bribery of Simon. In summarizing the voluminous evidence presented to the jury, we are mindful of the well established principle that "on appeal the evidence must be considered in a light most favorable to the government." *United States* v. *Dardi*, 330 F. 2d 316, 325 (2d Cir.), *cert. denied*, 379 U. S. 845 (1964); *United States* v. *Kelly*, 349 F. 2d 720,

730 (2d Cir. 1965), *cert. denied,* 384 U. S. 947 (1966). The government relied primarily on the testimony of co-conspirators Guterma, Eveleigh and Leonhardt. From their testimony and other evidence adduced at the trial, the jury was entitled to find the following facts.

The Wickersham Transaction

Saul Birnbaum, a certified public accountant and a partner in Birnbaum & Birnbaum, became acquainted with Robert Leonhardt in 1951, and Birnbaum's accounting firm served thereafter as Leonhardt's personal accountant until 1956.

In 1953, Leonhardt and Alexander Guterma formed an over-the-counter brokerage firm known as the McGrath Securities Corporation (McGrath), and Birnbaum's firm served as its accountant until 1956. Although Birnbaum knew Guterma, at no time did he serve as his personal accountant.

Birnbaum was also acquainted with Philip Shaiman, Albert Hayutin, and Marvin Hayutin, and in 1954 be became a principal owner with them of 1840 Lincoln Road Corporation (Lincoln),[2] a Denver enterprise which held real estate and was engaged in acquiring uranium claims in the Far West. The Denver group desired to sell its securities to the public and it was in this connection that in late 1954 Birnbaum put Marvin Hayutin in communication with Guterma. After exploring the situation, Guterma ap-

2 There is apparently some confusion as to the exact name of this corporation. During his direct examination Guterma referred to it as the 1840 Lincoln Road Corporation, and appellant's brief uses that designation. When Birnbaum was cross-examined, however, the prosecutor referred to the corporation as 1840 Lincoln Street. Reference to "Street" instead of "Road" is also to be found in the Government's brief. It is clear, however, that all parties are referring to the same corporation and we have referred to it as "Road."

proved the idea of merging Lincoln with an existing public corporation, and he recommended the Shawano Developcent Corporation (Shawano), of which he was president and the controlling stockholder, as the ideal company with which to merge. Shawano shares were already being traded in a wide market, and Guterma was eager to sell its shares to the public.

In January 1955, at a conference held in Denver, Guterma proposed to Birnbaum and the other owners of Lincoln that the Denver-based enterprise change its name to the Paul Revere Uranium Corporation (Revere), and that Guterma or his nominee purchase a 40% interest in Revere for $30,000. Thereafter, Revere would exchange its assets for 550,000 shares of Shawano stock and would dissolve. Guterma or his nominee would receive approximately 200,000 shares of Shawano, while Birnbaum and his associates would divide the remaining shares in proportion to their respective holdings in Revere. Following these transactions, the parties would cooperate in selling their Shawano shares to the public.

Rather than purchase a 40% interest in Revere directly, Guterma decided to exercise his option to buy its stock through a nominee. Upon returning to New York from the Denver meeting, he informed Leonhardt of the details of the proposed Shawano-Revere merger, and proposed to "sell" Leonhardt the stock of the Wickersham Corporation (Wickersham), a dormant Panamanian company owned entirely by Guterma, in exchange for Leonhardt's personal notes for $295,000,[3] which would be secured only by the

3 Actually, Leonhardt gave Guterma two notes totaling $320,000. The amount of the "debt" was reduced to $295,000 after Wickersham sold its Shawano stock in the spring of 1955. Leonhardt then wrote a letter to Guterma, antedated to February 10, 1955, to reflect that $295,000 was the original "purchase price" of Wickersham.

Wickersham stock so "purchased." Under the terms of the "sale," Wickersham was to purchase the 40% interest in Revere to which Guterma had the option. The profits that Wickersham would eventually realize by virtue of the merger and dissolution of Revere and the sale of the Shawano shares to the public through McGrath, would go to Guterma, with Leonhardt receiving about one-quarter as his share.

To summarize these complex transactions, it appears that the essence of the plan was that (1) Leonhardt would purchase Wickersham from Guterma, financing the purchase by his personal notes secured only by the Wickersham stock itself; (2) Leonhardt would cause Wickersham to purchase 40% of Revere's stock for a price of $30,000; (3) Revere would then exchange its assets for 550,000 shares of Shawano stock and dissolve; (4) upon dissolution of Revere 200,000 Shawano shares would be distributed to Wickersham, whose sole shareholder, Leonhardt, would sell them to the public and divide the profits with Guterma; and (5) the remaining 350,000 shares would be divided among Birnbaum and his associates who would also sell them to the public and retain the proceeds.

The plan, master-minded by Guterma, was carried out with precision. The eventual sale to the public of the Shawano stock brought Birnbaum approximately $190,000 in profits, while Wickersham derived a profit of $397,000. As Wickersham received cash from the sales of its Shawano shares, Leonhardt caused the corporation to "loan" these proceeds to Guterma in three installments, taking back Guterma's personal notes which then became Wickersham's only assets. Guterma in turn "loaned" Leonhardt $102,000, representing the latter's share of the profits.

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Ten months after Leonhardt's acquisition of Wickersham, the corporation was dissolved and its assets distributed to him. The ambagious transactions between Leonhardt and Guterma were finally concluded in August 1956 when Leonhardt gave Guterma two checks, one for $102,000 to repay Guterma's "loan" made in June 1955, and the second for $295,000 to pay off the notes with which Leonhardt had "purchased" Wickersham in February 1955. At the same time, Guterma repaid Leonhardt the $397,000 which Wickersham had "loaned" him after the sale of its Shawano stock to the public.

The Bribery of Simon

We now return to the core of the charges. When the proposed Wickersham transaction was outlined to Leonhardt in February 1955, Guterma assured him that his share of the profits could be treated as long-term capital gain, provided Leonhardt held his Wickersham stock for at least six months after "purchasing" it. Leonhardt then consulted his accountant Birnbaum about the proposed Wickersham transaction, and specifically sought instructions as to the form the deal should assume so that his profits would receive capital gains treatment.

Leonhardt's personal tax return for 1955, prepared by Birnbaum's firm, reported that his profits on the Wickersham deal were realized in December 1955 when the corporation was formally liquidated. Since Leonhardt purchased the Wickersham stock in February 1955, some ten months before, he reported the profits as long-term capital gains. The government urges, however, that Leonhardt's profit of $102,000 was actually in his hands in June 1955 when Guterma "loaned" him that sum, and therefore he realized the profit at a time less than six months after

his "purchase" of the Wickersham stock. Thus, the government reasons, there existed serious doubts as to whether the treatment of Leonhardt's profits as capital gains would have passed muster by a Revenue Agent examining the returns, and there always was extant a good reason to attempt to bribe the agent reviewing the returns.

In the fall of 1956, Leonhardt received a telephone call from Revenue Agent Harold Simon who had been assigned to audit McGrath's 1955 return. The two men met in January 1957 and Leonhardt told Simon to speak to Birnbaum, his accountant. After meeting with Simon, Birnbaum reported to Leonhardt that he "had nothing to worry about because . . . he had had lots of dealings with internal revenue agents and he knew which ones of them could be taken care of and this was one." Simon subsequently requested that he be assigned to audit Leonhardt's personal income tax returns for 1954 and 1955.

In April, Birnbaum reported to Leonhardt that the Wickersham transaction "was being looked at as straight income" but that treatment of the Wickersham profits as long-term capital gains could be assured by paying Simon $5,000. Birnbaum also informed Leonhardt that Guterma was being brought into the matter so that Birnbaum would "get his money from Guterma to take care of this Treasury Agent" and Leonhardt would only have to make "a token payment." A meeting was subsequently held between Guterma, Birnbaum and Simon in which Eveleigh later joined and after considerable bickering Guterma agreed to pay Simon $10,000 and give him 5000 shares of Shawano, but only if Simon succeeded in obtaining Guterma's 1955 return for audit, so that it could be coordinated with Leonhardt's treatment of the Wickersham profits. Eveleigh, Guterma's right hand man, testified that about ten days

later Simon was paid at Guterma's office, but that at Birnbaum's request the actual payment was not made until he left the office because Birnbaum said, "I don't want to be present when this takes place."[4]

Simon, however, was apparently not satisfied with the agreement the conspirators had reached, and in the summer of 1957 Birnbaum informed Leonhardt that he was going to have to pay Simon $25,000. Leonhardt balked, but finally agreed to pay $10,000 and an additional $5,000 or $6,000 when he could afford it. In September 1957, Leonhardt delivered $10,000 in cash to Birnbaum in the latter's office to give to Simon. Leonhardt, however, failed to make any additional payments. Another meeting occurred in April 1958, at which time Birnbaum, in Simon's presence, told Leonhardt that he was tired of his failure to pay, and that any future payments should be made directly to Simon. Thereafter, Simon continued to press Leonhardt for the money he owed, but these efforts were without success.

The Leonhardt-Birnbaum Tape

In July 1961, some four years after he had given Birnbaum $10,000 to give Simon, Leonhardt reported the bribery to the Federal Bureau of Investigation. Acting in cooperation with the authorities, Leonhardt met with Simon on September 13, 1961 and informed him that he would be unable to make any further payments. Following this meeting, and again acting under FBI supervision, Leon-

4 Although reluctant to be present when the actual payment occurred, Birnbaum apparently showed no hesitation in requesting compensation for his services. Guterma testified that in the fall of 1957 Birnbaum asked for $5,000 for the assistance he had rendered Simon in coordinating Leonhardt's and Guterma's treatment of the Wickersham transaction in their tax returns. Guterma finally agreed to give Birnbaum 5,000 shares of the Micro-Moisture Corporation, worth about $2,500.

hardt, armed with a concealed tape recorder, met with Birnbaum at the latter's office and recorded their conversation.[5] Finally, on October 9, FBI agents hidden in Leonhardt's apartment recorded on film the receipt by Simon of $1250 in marked bills from Leonhardt. Simon was arrested as he left the apartment shortly thereafter.

II.

With this recital of the underlying entangled facts, we may now approach the fundamental task of assessing Birnbaum's numerous allegations of prejudicial error. In order to place this appeal in proper perspective, we note at the very outset that although Birnbaum devoted a major portion of his brief and oral argument to attacking the prosecution's case against him, he does not claim that the evidence was insufficient to sustain the jury's verdict. Rather, asserting that since the "closeness" of the factual issues bears directly on the magnitude of error required for reversal, he attempts to demonstrate that the present case was actually a very close one and thus only a minimal amount of error was necessary to prejudice the jury against him. The record, however, fails to support this contention. Indeed, our dissenting brother believes the evidence of guilt was "overwhelming."

In assessing the alleged closeness of the case, we must view, as the jury did, the entire mosaic of evidence. We should avoid becoming over-absorbed with each tessera. See *U. S.* v. *White*, 124 F. 2d 181, 185 (2d Cir. 1941). From the testimony of Guterma, Leonhardt and Eveleigh, there emerges clear and overwhelming proof of Birnbaum's complicity, which the jury was, of course, free to accept.

5 A transcript of this conversation was introduced at the second trial by Birnbaum. The conversation will be discussed in more detail in a subsequent portion of this opinion.

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Although appellant has argued at great length that he lacked any motive to bribe Simon we recall that Leonhardt testified that Birnbaum had advised him as to the form the Wickersham transaction should take so that Leonhardt's profits would be recognized as long-term capital gains instead of ordinary income. Birnbaum may well have been troubled by the advice he had given when serious questions were later raised as to the correctness of his recommendations.

Moreover, it is undisputed that Birnbaum derived a profit of nearly $200,000 from the Wickersham deal, and it is suggested with some merit that he wished to avoid an SEC investigation that would link him to Guterma and his associates—a distinct possibility if the details of the Wickersham transaction were exposed during a thoroughgoing Internal Revenue audit of Leonhardt's return. Thus, it was to Birnbaum's personal advantage to be certain that Leonhardt's 1955 tax return was approved without any challenge or contest. In these circumstances, we see little merit to appellant's contention that the jury could not have found any motivation for Birnbaum's participation in the Simon bribery.

Birnbaum also attempts to demonstrate the alleged weakness of the government's case by attacking on appeal the credibility of the prosecution's witnesses. He points to the unsavory backgrounds of Guterma, Leonhardt and Eveleigh, and speculates as to their possible motives for implicating him in the bribery. But all of these arguments were forcefully presented to the jury by Birnbaum's counsel. Moreover, Birnbaum testified in his own behalf and vigorously denied the accusations of the government's witnesses. In addition, the prosecution's witnesses were subjected to rigorous and extensive cross-examination by Birnbaum's

exceptionally competent counsel;[6] nearly one-third of the defense's summation to the jury was devoted to attacking the credibility of Guterma, Leonhardt and Eveleigh, with such choice epithets as "unmitigated scoundrels," "greedy," "defrauders," "indicted perjurers," and "the biggest swindlers of the twentieth century." Birnbaum stressed to the jury that these three culprits were the only ones connecting him with the bribery charge, and that it was "incredible that anyone would believe their word . . . in light of the meaninglessness of the oath to them."[7] But the art of advocacy apparently failed to overcome the impression made by the prosecution's witnesses whose stories were subjected to the test still accepted as best calculated to reveal the truth. And, *not once, but twice*, did a jury choose to believe Guterma, Leonhardt and Eveleigh, to disbelieve Birnbaum, and to conclude beyond a reasonable doubt that Birnbaum was guilty of a serious crime.

In essence, appellant's argument is premised on the assumption that when the government's witnesses are men of questionable character, as often they must be, its case is inherently weak. There is, of course, no such principle of law. In bribery cases, just as in prosecutions for selling narcotics, the nature of the crime compels the government, more often than not, to rely heavily on the testimony of unsavory accomplices or informers. The Supreme Court

6 Guterma's direct examination consumed 100 pages of the record, while his cross-examination is recorded in 171 pages. Eveleigh's direct examination was 35 pages, while his cross-examinations consumed 83 pages. Leonhardt died before the second trial, and his testimony from the first trial was read to the jury.

7 The solemnity of the oath seems to have been somewhat meaningless to Birnbaum. At the first trial appellant denied having any conversation about Guterma's interest in the Paul Revere-Shawano merger, but at the second trial he admitted discussing the merger with both Guterma and Leonhardt. He also admitted discussing the Wickersham deal with Leonhardt although at the first trial he had denied having any discussion.

recently commented on this, noting that "it does not follow that ... [the informer's] testimony was untrue.... The established safeguards of the Anglo-American legal system leave the veracity of the witness to be tested by cross-examination." *Hoffa* v. *United States,* 385 U. S. 293, 311 (1966).

In long[8] and hard-fought cases such as the present one, an appellate court must be careful lest, in the words of Mr. Justice Frankfurter, "the perspective of the living trial is lost in the search for error in a dead record." *Glasser* v. *United States,* 315 U. S. 60, 88 (1942) (Frankfurter, *J.*, dissenting). Our legal system leaves the awesome question of guilt for the jury, with the prosecution assuming the proportionately difficult burden of persuading a jury of twelve that the defendant is guilty beyond a reasonable doubt. When, as in the present case, the evidence is sufficient to warrant submission to the trial jury, we must take care not to sit as a "super jury" reevaluating credibility or reweighing the evidence. See, *e.g., United States* v. *Kelly, supra; United States* v. *Dardi, supra; United States* v. *Kahaner,* 317 F. 2d 459 (2d Cir.), *cert. denied,* 375 U. S. 836 (1963). In cases where there is enough evidence to go to the jury, our main task is to determine whether there were errors by the court of sufficient prejudice to the defendant to justify vitiating the jury's verdict. It is to that task which we now turn, bearing in mind that we are not confronted with one of those rare cases which, because of deficiencies in proof, require reversal if but the slightest error is found.

8 The trial lasted 12 court days.

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III.

Every criminal case imposes special responsibilities on the trial judge, especially when the evidence is sharply controverted and the prosecution must rely on witnesses who admit their own guilt. The charge to the jury is one of the most difficult and important tasks performed by the judge, since the jurors must be correctly apprised of the relevant law in order that they can reach a proper verdict. Because of this, long hours are spent preparing the charge so that it will convey the law in terms well within the comprehension of a jury, while at the same time avoiding any suggestion that the judge favors one side over the other.

Despite the pains that are taken in the drafting of a precise and just charge, often misstatements creep into the jury's instructions; also, on occasion, the judge, absorbed in the trial, will inadvertently do something which will be interpreted as espousing a view on the case. But, as we have noted, "absolute perfection in trials will not be attained so long as human beings conduct them . . ." *United States* v. *Kahaner, supra* at 485. The relevant inquiry for an appellate court, therefore, is not whether the trial was free from errors, but rather whether it was free from *prejudicial* errors. See Rule 52(a), Federal Rules of Civil Procedure.

In determining whether a judge's charge has exceeded the bounds of propriety, a multitude of factors must be considered. The length of the charge, for instance, must be judged by the complexity of the factual and legal issues involved in the case, and the fashion in which counsel presented them to the jury. The trial judge is best suited to determine how detailed his charge must be in order that the jury derive the maximum benefit. Therefore, an appellate

court should not decide that a charge is defective by a mere count of the pages in the record. And it seems to us to be a rather straight-jacketed approach to conclude that a charge was excessively long by use of the rubric which suggests that two different trials before two different judges should proceed in exactly the same manner any more than that the same prosecutor or defense counsel must proceed in the second trial exactly as he did in the first. Multiple trials cannot be conducted identically and the length of each might well vary. Thus, for example, in Birnbaum's first trial, the Leonhardt-Birnbaum tape was not in evidence, and therefore did not have to be considered by Judge Murphy in his charge.

In evaluating the instructions to the jury, not only must each statement made by the judge be examined in light of the entire charge, but the charge itself can only be viewed as part of the total trial. Often isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial. Moreover, a juror's perception of the judge's attitude concerning the case, assuming he has displayed one, will be influenced not only by what the judge says in his charge, but also by how the judge conducted himself from the outset of the trial.

It is interesting to note that Birnbaum makes no claim that his trial in chief was not fair or that the court failed to preserve an atmosphere of impartiality. There is no allegation that Judge Cooper was discourteous or hostile to Birnbaum or his counsel, or attempted to take over or bolster the government's presentation or to undermine the defendant's case. Nor is he charged with conduct which was designed to restrict Birnbaum's right to cross-examine

the prosecution's witnesses[9] or to present fully his own case.[10] Rather the record reveals that the judge made overt efforts to be fair to the appellant. This is evidenced by the great pains he took at the inception of the trial to be certain that the selected jurors had not prejudged the case,[11] in his constant reminders to the jury of the importance of its task,[12] and in his admonitions that the government's version was not to be preferred over the defendant's:[13]

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9 As we have already noted, the cross-examination of the government's witnesses took substantially longer than their direct examination. See note 6, *supra*.

10 As defense counsel noted in summation, "The Court was very generous in the allowance of time to me."

11 Judge Cooper's questioning of the jurors occupies nearly 80 pages of the record, and in fact, in the interest of assuring appellant an impartial jury, a number of jurors were dismissed on the judge's direction and without the use of a peremptory challenge.

12 At the very outset of the trial, for example, Judge Cooper impressed the jurors with their responsibility:

> You are called a minister of justice. What does that encompass? Is it just sitting as wooden Indians? Is it to toss a coin to decide whether or not a person is guilty? Is it just to rush through at any and all costs the myriad of detail which make up a trial?
>
> Now, it is a dedication, letter and spirit, to the doing of justice. Nothing short of that will do, or there is no justice.
>
> You and I and the community have a stake in justice, for as it goes in the courtroom, so pretty much goes it in the community.
>
> The doing of justice is difficult. Everything in life worthwhile is difficult, whether giving birth to a child or meeting the exact moment of death.
>
> I repeat, nothing that is sacred, as justice is sacred, comes easy.
>
> Your mission is saturated with responsibility.

13 Who is right under the facts and on the law, which side? I mentioned that the government has the burden of proving the guilt of the defendant beyond a reasonable doubt, but I don't want to be misunderstood with regard to the part that the government plays in this case. The government is a party to this litigation. On one side you have the government. On the other side you have the defendant, and under our law—and this is something to contemplate—the mighty U. S. A. when it comes into a court is

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Moreover, Judge Cooper did not hesitate to exercise his discretion in Birnbaum's favor in order to be sure that he received a fair trial. Thus, for example, despite the fact that on the first appeal this Court had specifically approved of the showing at the earlier trial of the October 9, 1961 payment to Simon as recorded on film, Judge Cooper refused to allow the film to be viewed by the jury on the ground that its probative value might be over-balanced by the possible resultant prejudice. And in his charge, Judge Cooper erroneously instructed the jury in appellant's favor by stating that the prosecution must meet "a comparatively enormous degree of proof . . . to find him [Birnbaum] guilty beyond a reasonable doubt. . . ." This is not the language of a venal "hanging judge," bent on conviction.

Finally, it should be noted that even after the jury had deliberated at some length, Judge Cooper did not hasten to deliver the so-called *Allen* charge,[14] but indeed refrained from utilizing this controversial but, nevertheless, proper admonition to the jury which defendants generally abhor.

In sum, the trial transcript strongly suggests that Judge Cooper made every effort to be fair and courteous to both Birnbaum and the government. The record fails to reveal

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just another party to the litigation and has no greater standing than the other party to that litigation, but, of course, no less consideration, because we are concerned here with equal justice under the law, justice to the plaintiff and justice to the defendant. All parties stand equal in the eyes of the law, the government, the defendant, ...

14 In *Allen* v. *United States,* 164 U. S. 492 (1896), the Supreme Court approved a charge which with certain qualifying language, in substance, instructed the jurors that if the greater number of votes were for conviction, the dissenters should consider whether their doubts were reasonable ones. Similar charges have been upheld in this Circuit. See *United States* v. *Thomas,* 282 F. 2d 191, 195 (2d Cir. 1960); *United States* v. *Tolub,* 309 F. 2d 286, 289-90 (2d Cir. 1962); *United States* v. *Kahaner, supra* at 483-84.

any pattern of partiality toward one side and hostility toward the other that might be said to have contaminated the free air of an impartial tribunal.

IV.

The Charge

With the charge properly set in the framework of the trial, we proceed to consider the primary allegations of prejudicial error raised by Birnbaum.

The 1961 Payment to Simon

It will be recalled that in October 1961, Leonhardt paid Simon $1250 in marked bills, while agents of the Federal Bureau of Investigation recorded the incident on film. Birnbaum contends that he had no connection with this act of bribery since concededly he was not present when the payment occurred. Moreover, Birnbaum argues that even if a conspiracy involving him had existed, it had terminated by October 1961.

Similar contentions were raised by Birnbaum in his first appeal and were rejected by this Court:

> The passing of money to Simon may have had some probative value relating to the existence of the original bribe arrangement. . . . [W]ithin the narrow range set forth in Lutwak [Lutwak v. U. S., 344 U. S. 604 (1953)], the money passing was admissible.
>
> . . . The trial judge in balancing the probative value of the evidence against its possibly prejudicial effect is vested with broad discretion. [337 F. 2d at 496.]

We see no reason to overrule our prior holding.

Appellant claims that he was prejudiced by Judge Cooper's several references in his charge to the 1961 in-

cident. While we are of the view that the charge would not have suffered had fewer references been made to the incident, we are unable to conclude that any prejudice resulted. Cf. *United States* v. *Kelly, supra* at 765-66; *United States* v. *Kahaner, supra* at 478. The judge, we believe, clearly indicated the limited purpose for which the 1961 incident was to be considered. He instructed the jury:

> In determining whether there existed a conspiracy as charged, you may consider the passage of money between Leonhardt and Simon in October of 1961, a fact stipulated by both sides.
>
> What explains this passage of money? Note carefully that as a matter of law you may not consider the passing of the money in 1961 between Leonhardt and Simon as any evidence of defendant's membership at any time in the conspiracy as charged, should you find it to have been formed.
>
> • • • • •
>
> Now the government here is not relying on the second alleged act—the passage of money in October 1961—as an overt act in furtherance of the conspiracy. Rather it is maintaining only that proof of this act is one item of evidence, the passing of money in 1961 was just one act among others, going to the issue of whether in 1957 a conspiracy to bribe Simon did come into existence, not whether there was a conspiracy in 1961, but you may consider the passage of money in 1961, which is conceded took place in the absence of the defendant, you may take that into consideration in your assessment of the total evidence relating to the conspiracy back in 1957 and 1958. In other words, you may consider it as some evidence of the original conspiracy.

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The charge thus properly restricted the purpose for which the jury was to consider the 1961 payment to Simon. See *Lutwak* v. *United States, supra.*

Guilt by Association

(a) The portion of Birnbaum's attack on the charge that appears most serious to our dissenting brother is the allegation that Judge Cooper invited the jury to return a verdict of guilt by association by intimating that Birnbaum had been deeply involved in the questionable operations of Guterma, Leonhardt and Eveleigh. Appellant points specifically to certain passages of the charge as particularly damaging. He cites Judge Cooper's question to the jury:

> What manner of human beings in the main come before us? Certainly not the docile, the meek or the humble. They appear bold, aggressive, accustomed to swift financial deals with a twist. Men unacquainted with humility or sensitivity.

This statement, Birnbaum charges was intended to include him. But appellant overlooks the remainder of the paragraph:

> That does not mean that it necessarily follows that their testimony is unworthy of belief. The truth emerges from the most unlikely sources. In operations of the character which confront us the government must often rely and call to the stand even unsavory characters to count on their testimony to knit together the fragments of untainted evidence, to spell out a diabolical scheme.

It is thus clear that when Judge Cooper referred to "bold and aggressive" individuals "accustomed to swift

financial deals with a twist," he was speaking not of Birnbaum, but of the government's witnesses—Guterma, Leonhardt and Eveleigh—a trio characterized by appellant's counsel in far stronger terms. Indeed, Judge Cooper did not in this or in any other portion of his charge urge the jury to find guilt by association. Rather, he instructed the jury, and properly so, that a witness might be telling the truth despite his otherwise questionable character.

(b) Appellant next directs our attention to the following paragraph of the charge:

> The government, in other words, maintains that these were birds of a feather who stuck together and the defendant was one of them. But it is for you to determine how deeply involved the defendant really was with the operations of Guterma and his clique. Was he one of the gang, to use the vernacular? Did Guterma and his associates let him in on the ground floor and reveal to him the full force of their operations, or was he on the outside looking in? Did they just use him for his particular professional skill without revealing their true objective?

Judging is not an exact science. The judge cannot instruct the jury in precise mathematical or symbolic terms, as the scientist can describe a particular phenomenon merely by stating its formula. Rather, words—often inadequate—are the medium that the judge must employ to instruct the jurors, and in this sense "the poet or philosopher might do a better job than the lawyer or judge." Friendly, "Learned Hand: An Expression From the Second Circuit," 29 Brooklyn L. Rev. (1962).

But Judge Cooper's selection of the language or metaphor complained of does not lead us to the conclusion that

the charge was intended to prejudice or was in fact prejudicial to Birnbaum. We note that the passage to which appellant refers commences, "The government, in other words, maintains . . .," indicating that the judge was making it clear to the jury that he was summarizing what he conceived to be the prosecution's position. And while there was no allegation that Birnbaum was a member of Guterma's "clique" or "gang," the jury could properly conclude from appellant's large profit on the Wickersham transaction and his numerous contacts with Leonhardt and Guterma, that he indeed was a close associate of these men.

Moreover, even if the judge's rhetoric might have ignited a flame of emotions, he quickly doused the spark. The judge promptly added these words:

> Bear in mind that in the professions, even more so than in business, often clients make use of professional advice and direction without revealing, in fact designedly hiding, the illegal act, yes, even the foul deed he contemplates and when caught, he points accusingly at the unsuspecting professional whose aid he sought. Do you think that was the situation here from the entire record? You might ask yourselves whether the association of the defendant with this group was that of a professional who suspected the character of their operations, yet confined his activities to just giving professional services not to propel or perpetuate an unholy scheme, but in the sense that a physician or an attorney administers to the distressed with full knowledge that the beneficiary of his ministerings is deeply involved in sin?
>
> If you find that such was the case, then the defendant was not a willing participant in the illegal plan, either to conspire or to bribe. I suggest this to you,

not to indicate how the Judge feels, but to make you aware how carefully you must dissect the testimony.

* * * * *

In this day and age, many a professional is called in to render a service, and while he is rendering the service, he suddenly detects something or he is suspicious. There is something improper about to take place. What is he to do? Just by having heard this, does that make him a party? Of course not. That is where the emphasis on intent to do an unlawful act comes in.

Thus, with these considered words, the judge made it perfectly plain that Birnbaum's involvement in the Wickersham transaction did not necessarily lead to the conclusion that Birnbaum was involved in the subsequent bribe of Simon. Indeed, he gave the jury much food for thought before it could find this professional man guilty. And in case the point had not been driven home clearly enough, a few moments later Judge Cooper reiterated:

Mere association, mere association without more, is not proof of participation in a conspiracy. If a person associates himself with people who are not personally acceptable to you, you may not draw any adverse inference merely from that association. His guilt or innocence must be determined on the basis of his own acts.

These statements do not square with appellant's contention that Judge Cooper was inviting a verdict of guilt by association.

(c) Continuing to dissect the charge and to consider each portion in a vacuum, Birnbaum also cites the following statement:

> Having themselves been caught, why should he get off? He was as much a part of it as they. They might even reason that he was as much a party to it as they by obtaining professional fees, and he got them from them, without more. That they should stick him as much as they were stuck. I am talking the kind of language that people indulge in who think along those lines.

Appellant then rhetorically asks us in his brief, "What was all this about, we ask, and what was the jury to make of it?" This question is not clearly so difficult to answer as Birnbaum would have us believe. In fact, we are quite certain that appellant could have answered his own inquiry had he recalled the first sentences of the paragraph he quotes, for Judge Cooper began his statement:

> Now, why, inquires the government, or, what purpose can possibly prompt Guterma, Eveleigh and Leonhardt to testify falsely? They have already served their sentences, they have nothing to gain. You might so conclude, but not without weighing other possibilities, including the desire for revenge.

It was after this prologue that the judge proceeded, in the passage cited by Birnbaum, to offer possible reasons why the government's witnesses might have testified falsely. Once again, the passage not only failed to prejudice Birnbaum but affirmatively aided his case. It appears to us that in his zeal for obtaining a reversal, Birnbaum seems to have concluded that the trial judge could do little that was proper—even in those instances when the charge was clearly in the appellant's favor.

(d) Finally, Birnbaum calls our attention to the following statement of Judge Cooper, appearing toward the conclusion of his charge:

> Now take another thing. The government contends, or at least this is my suggestion, that the defendant was up to his ears in graft and corruption, with the Denver deal, with the various transactions from which he made a profit; that they were shady in character, he well knew, and this was long before Simon made his appearance on the scene.

When viewed in the perspective of the full charge, we cannot say that this was prejudicial. Cold words in isolation are a poor barometer of the true trial atmosphere. It is evident to us that when this portion of the charge was read, it had been made abundantly clear to the jury that the Denver deal—or Wickersham transaction as we have referred to it—was relevant only to the issue of possible motive for Birnbaum's alleged participation in the bribe, and that the government was not charging appellant with any crime other than his alleged complicity in that act.[15]

15 During the colloquy that followed the judge's charge, defense counsel objected to this, as well as other portions of the instructions. With regard to Judge Cooper's statement that "the defendant was up to his ears in graft and corruption," the prosecutor, motivated, we believe, by an excess of caution, stated that "the government would have no objection" if the judge wished to make even more clear that the government was alleging "corruption only with respect to the particular charges mentioned in the indictment." But, the prosecutor most certainly did not suggest or imply that he believed the charge had been misleading in any respect. In fact, he stated, "the government thinks that fact [that no broad allegations of corruption were being made] is clear from the total charge of the court."

Judge Cooper, in order to give a considered judgment to the objections and in fairness to Birnbaum, did not summarily rule but ordered a brief recess to "go over . . . [the exceptions] in my own mind." He apparently concluded after some thought, as we have (and the government had) that the charge was clear and not prejudicial. He might well have believed that any further instructions to the jury would not clarify but confuse.

At this late stage of the charge we do not believe that the descriptive language could have confused or prejudiced the jury.

Comment on the Leonhardt-Birnbaum Tape

Birnbaum complains that Judge Cooper erred by failing to instruct the jury that the tape of the October 2 conversation with Leonhardt was favorable to him. He points to the fact that Leonhardt, although attempting to trap Birnbaum into making damaging admissions, never accused Birnbaum to his face of participating in the bribery of Simon. This indicates, Birnbaum suggests, that he was not implicated.

The subject matter of the tape was extensively covered in the summations of the prosecutor and defense counsel, and Birnbaum placed heavy emphasis on this evidence. While Judge Cooper commented only briefly on the tape during his charge to the jury, appellant criticizes the judge's remarks as unfair. But, it is interesting to note that the brief excerpt from the transcript of the tape which the judge read, contained this favorable statement by Birnbaum. "Simon would never recommend something that's against the government's interest." It is thus difficult for us to comprehend any fair basis for appellant's complaint.

Moreover, Birnbaum never requested the court to charge *in haec verba* that it was significant that Leonhardt failed to accuse Birnbaum of being implicated in the bribe. "It is quite impractical for a trial judge, summarizing a case to a jury, to develop each piece of evidence offered in support of an indictment, each item offered in rebuttal, and each opposing inference to be drawn. An appellate court reviewing such a summary not only must consider it as a

whole but must place it in the jury's hearing of the evidence and the summations of counsel." *United States* v. *Kahaner, supra* at 479.

We have already noted, that able defense counsel placed great emphasis on the tape and stressed to the jury all the inferences which it could draw in Birnbaum's favor. It was for the jury to decide whether the tape did, indeed, prove Birnbaum's innocence, or merely revealed that he was on his guard during the meeting and thus avoided any discussion of the bribery.[16]

In summary, upon reviewing the entire charge and considering each of appellant's arguments,[17] we are of the

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16 At the very beginning of the conversation, for example, Birnbaum denied knowing Simon, but his subsequent remarks cast doubt on the veracity of his denial—

L: . . . You know SIMONS was in to see me, that's why I wanted to talk to you.
B: Oh, yeah?
L: . . . that Revenue agent, you know.
B: I don't know him.
L: You forgot about him, huh? I haven't cause I haven't finished with him yet.
B: . . . Inaudible . . .
L: Not yet.
B: . . . Inaudible . . . I thought he closed the case.

17 In addition to the attacks on Judge Cooper's charge already discussed in detail, Birnbaum raises other contentions which may be disposed of summarily:

a. *The Frame of the Charge.* It is clear that Judge Cooper referred to the jurors as "ministers of justice" only to impress them with the seriousness and solemnity of their task. The record is clear that in summarizing the facts to the jury, the judge was careful to emphasize that he was not commenting on the evidence, that the jurors were the sole and exclusive judges of the facts, and that they should not attempt under any circumstances to read anything into his remarks.

b. *Credibility of the Witnesses.* Judge Cooper did not instruct the jury, as claimed, that the government's witnesses had "nothing to gain" by testifying against Birnbaum. Though not cataloguing every reason why they might testify against Birnbaum, the judge did elaborate quite favorably to the defendant on the possibility that a desire for revenge might have led them to lie. Nor did the charge instruct the jurors that the government's failure to indict its witnesses was irrelevant in determining

view that if errors were committed, they were but separate, unintentional, isolated and non-prejudicial instances, and that none of Birnbaum's contentions, either individually or collectively, demonstrate that he was deprived of a fair trial.

V.

There remains one last contention raised by the appellant which we must consider. At Birnbaum's first trial the tape of the Leonhardt-Birnbaum conversation was not made available to the appellant, and therefore he was unable to use it to cross-examine Leonhardt. On appeal from his first conviction, Birnbaum urged that the trial court's failure to order the production of the transcript of the conversation was a violation of the Jencks Act, and constituted reversible error. The issue presented for our consideration at that time was whether the tape related "to the subject matter as to which the witness has testified," 18 U. S. C. §3500. Whether the tape was so "related" to Leonhardt's direct examination turned on whether it related "generally to the events and activities testified to." *United States* v. *Cardillo*, 316 F. 2d 606, 615 (2d Cir.), *cert. denied*, 375 U. S. 822 (1963).

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their credibility. Rather, the judge explained that this failure to indict did not establish that Guterma, Leonhardt and Eveleigh had not conspired with Birnbaum. Finally, there is no merit to appellant's claim that Judge Cooper should have charged the jury that it *must* consider the criminal records of the government's witnesses when determining what weight to give to their testimony. The jury was free to accept or disregard any relevant evidence presented.

c. *Assumed Facts.* The portion of the charge to which appellant objects did not assume any facts. Judge Cooper was careful to note that he was only recounting Eveleigh's testimony.

d. *Erroneous Conclusion.* Judge Cooper did not conclude on an erroneous note. The jury was well aware of the heavy burden of proof which the government had to meet. On at least eight separate occasions the jurors were instructed that guilt must be proven "beyond a reasonable doubt."

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After examining the transcript of the conversation, we concluded:

> [W]e are unable to agree that the trial court's ruling can be fairly characterized as clearly erroneous. This determination does not mean that on a new trial when the facts may be developed in a different manner, a different position should not be taken and that the trial judge may not exercise his discretion in a different manner. [337 F. 2d at 498.]

After the first appeal, and before the second trial commenced, Leonhardt died. Judge Cooper followed the established rule in the federal courts that testimony given in a former criminal trial is admissible in a retrial of that cause, see *Coppedge* v. *United States,* 311 F. 2d 128, 132 (D. C. Cir. 1962), *cert. denied,* 373 U. S. 946 (1963). He allowed the prosecution, therefore, to read Leonhardt's testimony.[18] The judge also ordered the government to turn over the transcript of the Leonhardt-Birnbaum tape to appellant, and Birnbaum introduced it into evidence and argued its contents to the jury.

Appellant now urges that at his first trial he was denied the opportunity to properly cross-examine Leonhardt because the tape had not been made available, and therefore Judge Cooper committed reversible error by allowing Leonhardt's testimony to be read to the jury. We find this contention to be without merit. On the first appeal we concluded that withholding the tape from appellant had not been shown to be prejudicial. Implicit in our holding was

18 The trial court deleted that portion of Leonhardt's testimony which we had found on the first appeal to be inadmissible as a hearsay statement of Simon's remarks.

our recognition that appellant had not been denied an adequate opportunity to cross-examine Leonhardt. In light of our decision, it was permissible for the prosecution to introduce Leonhardt's prior testimony. The fact that at his second trial Birnbaum was given the tape does not alter this. It was Birnbaum who made the decision to introduce the tape into evidence, and a by-product of Leonhardt's absence was that Birnbaum benefited. Leonhardt could not be produced by the government to give his reasons for failing to confront Birnbaum with the latter's alleged participation in the Simon bribery—an omission Birnbaum showed little reluctance to drive home to the jury. Birnbaum would "have his cake and eat it too," were he permitted to reap this benefit flowing from Leonhardt's unavailability, and at the same time to succeed in having Leonhardt's former testimony excluded on the ground that he was not adequately cross-examined. The judge did not err in allowing this testimony to be read.

VI.

Essentially we have been engaged here in a search for the meaning and motivations that lay behind the words and acts of the trial judge, and the likely effect of his overall conduct upon the jury. We are mindful that such a course is fraught with the possibility that we will misinterpret what has in fact taken place, for there is no scientific method by which to reconstruct the atmosphere of the trial and the impact of words on men's minds. Because of our own predilections, there is always the hazard that one may imagine emphasis where none was intended or resulted. It is all too easy for appellate judges, removed from the heat of the adversary fray, to divine, as if omniscient, what the trial judge should have said, and

when silence would have proved the wiser exercise of judgment. We have tried to view the charge in its entirety, weaving each sentence into its proper context in the fabric of the charge. Our efforts have led us to conclude that in totality the trial was fair, the charge was fair, albeit we might not have expressed ourselves or ordered our charge as did the trial judge, and the errors, if any, slight. In short, none of appellant's contentions merit a reversal of his conviction.[19]

Judgment affirmed.

LUMBARD, *Chief Judge*, dissenting.

I would reverse the conviction. In my view the trial court's charge to the jury went so far beyond the permissible limits of comment that it denied Birnbaum the fair trial to which every defendant is entitled. The lengthy and confusing charge contained many irrelevant observations and emphasized arguments which were prejudicial to the defendant. On the points other than the judge's erroneous and unfair charge, I concur in Judge Kaufman's opinion.

While every trial judge would have his own views on how extensively to discuss the evidence in the case in his charge to the jury, here the trial judge had the benefit of the example of a charge in this very case upon the first trial. Judge Murphy's charge was a model of clarity and brevity; it informed the jury of the applicable statutes,

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19 "We have agreed . . . that certain instructions are not to be commended, but this does not imply that they were prejudicially erroneous, or even that they were erroneous. There are different ways of saying the same thing. Trial court judges sometimes seem to have difficulty in keeping their instructions short and clear; appellate court judges seem to have the same difficulties with their opinions. In fact, this opinion might well have been limited to the statement: We have carefully considered all of the assignments of error and find no prejudicial error; judgment affirmed." *State* v. *Williams*, 416 P. 2d 350, 355 (1966) (footnote omitted).

the questions of fact which the jury must decide and the appropriate rules to be applied in making its decisions.[1] The charge on the first trial contained a minimum of comment on the evidence; in the printed record it covered 19 pages. There was little more which the trial judge needed to cover after the second trial but his charge covers 56 printed pages of the record because of his numerous comments. If ever there were an example of the wisdom of keeping the judge's charge down to a minimum of what the case requires it lies in the comparison of the charges to the jury on the first and the second trials of this case. Thus it is not too surprising that the additional two hours which the second jury spent in listening to the ruminations of the trial judge were freighted with much unnecessary matter. Instead of remaining an impartial arbiter instructing the jury on its duties, the judge at many points argued and emphasized the government's contentions. A reading of the charge makes it crystal clear that the judge was strongly of the view that the defendant was one of Guterma's gang, that he was guilty and that it was the duty of the jury to convict him. Had this been done fairly we ought still to affirm as I cannot disagree with my brethren in their conclusion that proof of guilt was overwhelming. But here the trial judge imported many extraneous considerations into the case; he emphasized matters which did not need mention; and he argued the government's side of important bits of evidence.

The government's case depended upon whether the jury believed the essentials of the testimony of Guterma, Eveleigh and Leonhardt. The defense argued that these three government witnesses were not to be believed in view of

1 On appeal, this court sustained one of the two objections to Judge Murphy's charge, dealing with the appraisal of character evidence, 337 F. 2d at 498-99, and the trial court had the benefit of this ruling in framing its charge.

their past records and their low regard for truth-telling and because they had good reason to earn consideration from the government by implicating Birnbaum. The references to these witnesses emphasized the government's position and omitted entirely any mention of the possible reasons for giving false testimony against Birnbaum. After stating the government's position that, having served their sentences, they had nothing to gain in giving testimony, he suggested that the jury weigh the possibility of revenge as a motive. The trial judge made no mention of the evidence that Guterma was then on parole and that Eveleigh was under an order of deportation, and when this omission was called to his attention by defense counsel, the judge refused to correct his comment. In addition, the judge made no allusion to the fact that when Leonhardt gave his testimony he had a federal fraud indictment pending against him.

Moreover, the trial judge made it clear in several ways that it was important that the jury consider Birnbaum's relationship with these three witnesses because Birnbaum might well be as bad a person as every one of them. Of course this was not the charge before the jury; the question was not guilt by association, but whether Birnbaum assisted in the bribing of Simon. After a detailed and lengthy summary of the government's case, followed by numerous generalizations regarding the law applicable to the conspiracy charge, the trial judge stated:

> "What manner of human beings in the main came before us? Certainly not the docile, the meek or the humble. They appear bold, aggressive, accustomed to swift financial deals with a twist. Men unacquainted with humility or sensitivity. That does not mean that it necessarily follows that their testimony is unworthy

of belief. The truth emerges from the most unlikely sources. In operations of the character which confront us, the government must often rely and call to the stand even unsavory characters to count on their testimony to knit together the fragments of untainted evidence, to spell out a diabolical scheme.

"The government, in other words, maintains that these were birds of a feather who stuck together and the defendant was one of them. But it is for you to determine how deeply involved the defendant really was with the operations of Guterma and his clique. Was he one of the gang, to use the vernacular? Did Guterma and his associates let him in on the ground floor and reveal to him the full force of their operations, or was he on the outside looking in? Did they just use him for his particular professional skill without revealing their true objective?"

The clear implication was that it would be enough for the jury to find that Birnbaum was "one of the gang," as he then would know what was going on and would be a party to it. While it is true that the court followed this with the suggestion that an accountant does not always know what his clients are up to and that he is not guilty if he merely gives professional advice, this did not redress the balance because somewhat later the judge returned to the theme in words which startled even the prosecutor:

"Now, take another thing. The government contends, or at least this is my suggestion, that the defendant was up to his ears in graft and corruption, with the Denver deal, with the various transactions from which he made a profit; that they were shady in character, he well knew, and this was long before Simon made his

appearance on the scene. Well, the defendant concededly made out the returns for Leonhardt for 1955 and for a few years before. He knew Leonhardt. He said he did. He testified he knew him.

"Well, then, if that was the relationship between Leonhardt and the defendant as of the close of 1956 when Simon first made his appearance, what importance do you attach to two pieces of evidence: one, that the defendant was no longer Leonhardt's accountant? Two men, says the government, corrupt, having something on one another, yet they bust up their relationship as accountant and client. What do you make of the letter that the defendant sent around that time asking for a professional fee? What weight do you give that?"

This is the stuff of which prosecutors make their summations; it ought not to be the stuff with which judges charge juries. The issue was not whether Birnbaum was "up to his ears in graft and corruption," or whether he had made a profit from some deals which were "shady in character." Indeed, the government never charged this, as the prosecutor made clear after defense counsel had objected to this part of the charge during the colloquy which followed the completion of the judge's charge. What the prosecutor then said makes it clear that the language could be and must have been construed to mean that the government was charging Birnbaum with being a corrupt man:

"I would also suggest that your Honor might consider Mr. Bauman's exception with regard to your Honor's statement to the contention that Birnbaum was up to his ears in corruption. A fair reading would indicate to the jury that the government is charging

corruption only with respect to the particular charge mentioned in the indictment. We are not making a broad allegation of corruption. That is crystal clear in the charge as it exists now, but if your Honor wishes more precisely to define that to the jury, the government would have no objection. In other words, to say to the jury that the only charge of corruption being made is the corruption charged in the indictment. That would clean up any other implications which the jury might read from your Honor's charge, that maybe the government is charging corruption in other areas. If your Honor wants to pinpoint that to the jury, the government would have no objection, although I will say the government thinks that fact is clear from the total charge by the court."

Although the trial judge himself commented that the prosecutor "seems to think the expression might be misleading" and although he then took a brief recess "so I can go over it in my own mind," he refused to make any correction whatever.

This portion of the charge was immediately followed by further argument by the court which was confusing if not irrelevant in its reference to a letter Birnbaum sent to Leonhardt asking for a fee:

"Is this from a man who has reason to believe that the fellow to whom he sent the letter got something on him? I only mention this to have you closely examine the evidence, including the exhibits. Of course, those letters could have been sent and the relationship between the two, as accountant and client, may have been for the purposes of appearance so that people wouldn't judge what is going on between them. But you've got to weigh these things."

Birnbaum further points out that the trial judge placed undue emphasis upon the October 1961 incident where it was conceded that Leonhardt, then cooperating fully with the F.B.I., went to Simon and paid him $1,250 in cash. The judge admitted this evidence under our holding on the first appeal that the evidence could be received in the discretion of the trial judge but only on the question whether in fact the conspiracy charged had been in existence in 1957 and 1958. Judge Murphy in his charge to the first jury merely mentioned this incident as an alleged overt act. Despite the fact that we had pointed out the very limited purpose for which the evidence should be received, Judge Cooper referred to the incident on four occasions, in a manner which must have had the effect of injecting it into the case against Birnbaum for all purposes. In view of the very tenuous and limited nature of this evidence I think it was an abuse of the judge's discretion to make these repeated references.

The last three references to the 1961 incident were wholly unnecessary. Thus the second reference was stated as a mere reminder: "You will remember, for example, that I have instructed you that you may not consider as evidence of defendant's membership in the conspiracy the stipulated fact that in 1961 money passed between Leonhardt and Simon out of the presence of the defendant."

Nor was there any need to refer to the 1961 incident in the discussion of the overt acts, especially as the government on this second trial was not relying upon this overt act. Nevertheless, the trial judge again mentioned it in these words:

> "Now the government here is not relying on the second alleged act—the passage of money in October 1961—as an overt act in furtherance of the conspiracy.

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(on the second appeal)

> Rather it is maintaining only that proof of this act is one item of evidence, the passing of money in 1961 was just one act among others, going to the issue of whether in 1957 a conspiracy to bribe Simon did come into existence, not whether there was a conspiracy in 1961, but you may consider the passage of money in 1961, which is conceded took place in the absence of the defendant, you may take that into consideration in your assessment of the total evidence relating to the conspiracy back in 1957 and 1958. In other words, you may consider it as some evidence of the original conspiracy."

And later, among a number of disconnected and wholly unnecessary comments, toward the end of his long charge, in suggesting "some of the things which you should consider," the first on the list was the 1961 incident, without any explanation of its limited relevance:

> "A few comments about the passage of money in 1961. What was it? Was it an innocent act, perhaps involving repayment by Leonhardt to Simon of a legitimate debt? Was it a part or whole of a bribe from Leonhardt to Simon, separate and apart from the schemes charged in this indictment, perhaps reflecting the concern Leonhardt had for the Denver audits? Was it a payment deferred from what Leonhardt owed Simon on the bribe for the 1957-1958 scheme? Was it a tainted payment for other matters not disclosed upon the record?"

Placed as it was as the first on the list of matters to be considered in this further summation of the evidence regarding *Birnbaum's guilt on both counts,* the judge threw

it in for consideration on the whole case. Furthermore, what was the jury to think when the judge asked the question, "Was it a tainted payment for other matters not disclosed upon the record?" Did this imply participation by Birnbaum in the payment? After the charge was finally ended, counsel took exception to the court's "repeated references to the passage of money in 1961," all to no avail.

No matter how overwhelming the proof may seem to the trial judge, or to the appellate court which later passes on the case, the trial judge must keep his role of an impartial arbitrator. If he is to give a balanced charge which will instruct the jury so that their role is clarified and the issues are suitably simplified, he is well advised to limit his comments on the evidence. The issues here were simple enough and could have been simply stated. These same issues were treated by Judge Murphy in the first trial in a brief and succinct charge. Here the trial judge stepped out of his role and was carried away by his advocacy into remarks which obviously were as extemporaneous as they were unnecessary. In many respects his arguments went beyond those of the prosecution and misstated the claims of the government. There can be no fair trial where the trial judge so abuses his power and puts his great and unquestioned influence in the scales against the defendant. *Quercia* v. *United States,* 289 U. S. 466 (1933).

Where the judge's charge contains so many irrelevant and improper arguments which clearly are prejudicial to the defendant we cannot say that the defendant has been fairly tried. In such a case the verdict should be set aside. It matters not how guilty the defendant may be nor how many juries have said so. The proceedings are tainted and should not stand.

APPENDIX B

Opinion of Court of Appeals

on the petition for rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 88—September Term, 1966.

(Submitted February 24, 1967 Decided March 31, 1967.)

Docket No. 30511

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAUL I. BIRNBAUM,

Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and KAUFMAN, *Circuit Judges.*

Petition for rehearing.
Denied.

DAVID W. PECK, BEN HERZBERG, NORMAN BERNSTEIN, Hays, Sklar & Herzberg, New York, N. Y., on the brief, *for appellant.*

ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York; Peter Fleming, Jr., Douglas S. Liebhafsky, Michael W. Mitchell, Assistant United States Attorneys, on the brief, *for appellee.*

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PER CURIAM:

In an apparent shift of emphasis, appellant has devoted the greater part of his petition for rehearing to arguing that we should have reversed his conviction because of Judge Cooper's alleged error in admitting Leonhardt's former testimony. Birnbaum's petition for rehearing merely restates—though at considerably greater length and with more vehemence—the same argument which we understood appellant to be making on the appeal proper, and which we unanimously rejected in our opinion. Though we believe our decision adequately explained our rationale for rejecting Birnbaum's argument, we will elaborate somewhat on our holding in order to put to rest any misgiving that appellant may have as to our recognition of his contentions.

On his first appeal, Birnbaum argued that Judge Murphy had erred in refusing to turn over to appellant the transcript of the Leonhardt-Birnbaum tape. That Court, after reading the transcript, unanimously rejected the contention because it believed that the trial court's finding that the tape was not "related" to Leonhardt's testimony afforded no basis for reversal. Our later opinion in *United States* v. *Ellenbogen*, 341 F. 2d 893 (1965), cited by appellant as necessitating a reversal of his conviction, is not apposite for in *Ellenbogen* we held only that where statements are related to testimony, they must be produced. Since we recognized on this appeal that Judge Murphy had concluded that the tape did *not* relate to Leonhardt's testimony, we do not believe *Ellenbogen* in any way overruled or modified our first *Birnbaum* opinion. Indeed, *Ellenbogen* cited the *Birnbaum* opinion with approval.

At his second trial, as we noted in our opinion, Birnbaum was furnished with the transcript of the Leonhardt-Birn-

baum conversation. On appeal from the second conviction, however, he argued once more that Judge Murphy had erred in not ordering the production of the transcript at the first trial. Appellant renewed this contention in the hope of persuading us that he had been denied an adequate opportunity at his first trial to cross-examine Leonhardt, and that Judge Cooper had erred when he admitted Leonhardt's former testimony into evidence. But we believe we answered this claim in our opinion by stating, "implicit in our [first] holding was our recognition that appellant had not been denied an adequate opportunity to cross-examine Leonhardt." Thus, even if there were error (which we have indicated there was not) in not giving Birnbaum the transcript at his first trial, it was at most harmless error, and we therefore see no reason to reverse appellant's second conviction. See *United States* v. *Annunziato,* 293 F. 2d 373 (2d Cir. 1961).

Birnbaum urges, however, that the transcript would have enabled him to confront Leonhardt with his failure directly to accuse him of complicity in the Simon bribe. But, the absence of any prejudice to appellant is clear from the record at both his trials. The opportunity for full cross-examination was indeed available to Birnbaum at the first trial without recourse to the Leonhardt-Birnbaum tape, and it is apparent that he abandoned the opportunity for tactical reasons. We cannot ignore the fact that the conversation with Leonhardt took place in Birnbaum's office and that Birnbaum was the other party to it. Thus, he knew well that Leonhardt had not accused him directly of complicity in the Simon bribe. The important information supposedly revealed by the transcript was, therefore, available to Birnbaum and his counsel in another form—Birnbaum's own recollection.

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Moreover, the first trial furnished Birnbaum with additional information. Following Leonhardt's direct examination, the appellant was provided with Government's Exhibit 23A, an FBI report of an interview with Leonhardt. The report disclosed that Leonhardt had advised the FBI on August 21, 1961 that:

> "[H]e believes he is friendly enough with SIMONS to invite him to lunch and discuss the money without arousing his suspicion. . . . [H]e also believes that while he has not seen BIRNBAUM in about a year, he could also have a conversation with BIRNBAUM about his tax problems and other matters and bring up the SIMONS situation."

It should be noted that Leonhardt had testified at the first trial to having such a conversation with Simon on September 13, 1961, and that he had recorded that conversation. Moreover, the government, while opposing the production of the Leonhardt-Birnbaum transcript at the earlier trial, had nevertheless identified the exhibit (GX27) as the transcript of a conversation between those two men held on October 2, 1961. Knowing all this and, in addition, being a party to the conversation,[1] appellant chose not to cross-examine Leonhardt regarding his failure to accuse Birnbaum on October 2, 1961 of having participated in the bribe.[2] And, it is interesting that Birnbaum himself failed to mention the allegedly exculpatory conversation with Leonhardt

1 Birnbaum's knowledge as to what transpired during his conversation with Leonhardt clearly distinguishes this case from *Dennis* v. *United States*, 384 U. S. 855 (1966). In *Dennis* the petitioners had sought production of the grand jury testimony given by four government witnesses. The petitioners there, unlike Birnbaum, had no knowledge of or access to the statements made to the grand jury.

2 At the first trial Birnbaum cross-examined Leonhardt for 2½ days.

when he testified at the first trial. Instead, he contented himself with his counsel's trial tactic to wait until his summation to the jury (when Leonhardt was foreclosed from explaining or answering) to make his broadside attack on Leonhardt's testimony because he failed "at any time in any conversation" to accuse Birnbaum of his part in the bribe. And, Mr. Brill, his lawyer at the first trial added: "and you know very well that the reason there was not such a conversation with Birnbaum was because it never happened." It is also noted that a similarly potent argument by appellant's counsel was made at Birnbaum's second trial when Leonhardt—this time due to his death—was again unable to explain his behavior.

It is thus clear to us that the failure to provide Birnbaum at the first trial with a copy of the transcript of the Leonhardt-Birnbaum tape did not deny him an adequate opportunity to cross-examine Leonhardt. It is apparent that appellant avoided confrontation on the issue involved while Leonhardt was alive and this maneuver can provide him with little solace now that Leonhardt is dead. Leonhardt's former testimony was properly admitted at Birnbaum's second trial.

Petition for rehearing denied in all respects. Petition to stay mandate pending application to the Supreme Court for certiorari granted pursuant to Rule 28(c) of this Court.

APPENDIX C

Judgment of Court of Appeals

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of February one thousand nine hundred and sixty-seven.

Present—Hon. J. EDWARD LUMBARD, Chief Judge
Hon. LEONARD P. MOORE,
Hon. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD SIMON,
Defendant,

SAUL I. BIRNBAUM,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX D

The full discussion as to the Jencks Act point in the opinion on the first appeal

The Alleged Jencks Act Statements

Following his September 13, 1961 meeting with Simon, Leonhardt had two conversations with Birnbaum. On October 2, 1961, Leonhardt met Birnbaum at Birnbaum's office and four days later they conversed over the telephone. Both conversations were recorded by the FBI. Appellant now claims reversible error in the trial court's failure, after *in camera* inspection, to order the production of the transcripts of these conversations pursuant to 18 U. S. C. A. §3500. Appellant concedes that the Government did not examine Leonhardt about either of these conversations and that he made no mention of them in his direct testimony. Nevertheless, in view of Leonhardt's testimony of his conversation with Simon, appellant urges that it would be highly significant, as bearing upon the truth of Leonhardt's testimony, to know whether or not Simon's accusations were brought up in subsequent conversations with Birnbaum. There is no dispute that the transcripts are "statements" within the meaning of subsection (e) of the Act. The question is whether they relate "to the subject matter as to which the witness has testified." Whether a witness' statement is "related to" his direct examination depends on whether the statement sought to be produced relates "generally to the events and activities testified to." *United States* v. *Cardillo,* 316 F. 2d 606, 615 (2d Cir.), *cert. denied,* 375 U. S. 822 (1963). It is for the trial court to determine which statements are sufficiently related and which are merely "incidental or collateral," *United States* v. *Cardillo, supra.*

To support the trial court's ruling, the government relies on the fact that it made no inquiry as to either conversation

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on its direct examination. Thus, the government contends that if it does not examine as to specific conversations, "a witness' statement regarding those conversations should not be produced, even if, arguably, they could have some impeachment value" and that "the Court should only order production when the activities and events testified to on direct examination are substantially identical with activities and events discussed in prior statements." This reasoning is too restrictive and appears to be the same as that recently rejected in *United States* v. *Borelli*, 336 F. 2d 376 (2d Cir., 1964). In that case the document in question was a witness' letter to the Government in which he proposed to assist the Government in exchange for special consideration for himself. "We see no reason why a statement that would support impeachment for bias and interest does not 'relate' to the witness' testimony as much as a statement permitting impeachment for faulty memory, *Rosenberg* v. *United States*, 360 U. S. 367, 370 (1959)." In *Rosenberg, supra*, the Court observed: "A statement by a witness that she fears her memory as to the events at issue was poor certainly 'relates to the subject matter as to which the witness has testified' and should have been given to the defendant." 360 U. S. at 370. From *Rosenberg* and *Borelli*, it seems plain that the witness need not have testified on direct to the specific conversation or document; but it is also clear that not all statements that might in some way be helpful in impeaching the witness are producible. It hardly warrants repeating that particular facts must control—and, "The possible permutations of fact and circumstance are myriad." *Palermo* v. *United States*, 360 U. S. 343, 353 (1959). The

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object of these conversations, of course, was to garner evidence of appellant's complicity in the bribery scheme. We have examined the transcripts of the conversations and despite appellant's argument that lack of mention of the earlier Simon-Leonhardt conversations in itself could have proved valuable for impeachment purposes, we are unable to agree that the trial court's ruling can be fairly characterized as clearly erroneous. This determination does not mean that on a new trial when the facts may be developed in a different manner, a different position should not be taken and that the trial judge may not exercise his discretion in a different manner.

APPENDIX E

Constitutional Provisions, Statutes and Rule Involved

U. S. Constitution

Amendment V

(Excerpted in pertinent part)

"No person shall be held to answer for a capital, or other infamous crime . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

Amendment VI

(Excerpted in pertinent part)

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

The Jencks Act

18 U.S.C. §3500

"Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion

of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such state-

ment by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsection (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

28 U.S.C. §2111

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURT
Rule 52(a)

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 195

SAUL BIRNBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 373 F.2d 250.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1967. A petition for rehearing was denied on March 31, 1967 (Pet. App. B). Mr. Justice Harlan extended the time for filing a petition for a

writ of certiorari to May 29, 1967, and the petition was filed on May 26. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly admitted into evidence the testimony of a deceased witness taken at petitioner's first trial, although at the first trial a recording of a conversation with petitioner, not referred to in direct testimony, had not been turned over to the defense.

2. Whether the trial court's instructions were prejudicial to petitioner.

STATEMENT

On retrial,[1] petitioner was convicted by a jury in the United States District Court for the Southern District of New York of bribing an agent of the Internal Revenue Service and conspiring to do so, in violation of 18 U.S.C. 201 and 371. On April 1, 1966, he was sentenced to imprisonment for one year on each count, the sentences to run concurrently. The court of appeals affirmed, one judge dissenting (Pet. App. A).

1. Petitioner's conviction stems from his participation in the bribery of Harold Simon, an Internal Revenue agent, by Robert Leonhardt and Alexander Guterma.

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[1] Petitioner's first conviction was reversed by the court of appeals because of the improper admission of hearsay testimony (see 337 F.2d 490).

Petitioner was a certified public accountant, and a partner in a New York City firm which served as the accountant for Leonhardt and McGrath Securities Corporation. McGrath was owned jointly by Leonhardt and Guterma until April 1955, when Leonhardt purchased Guterma's entire interest (Tr. 223, 466). By a complicated series of transactions with Guterma, set forth in detail in the opinion below (Pet. App. A 4-7), Leonhardt made a profit in connection with the so-called Wickersham transaction which he regarded as long-term capital gain on his 1955 federal income tax return, prepared by petitioner's firm.

At the first trial Leonhardt testified[2] that in November 1956 he received a call from Simon, who explained that he had been assigned to audit the 1955 tax return of McGrath Securities (Tr. 646). Leonhardt anticipated that a review of the McGrath return would call for an examination of his personal return as well. He contacted petitioner, who stated that there was nothing to worry about. Petitioner told Leonhardt that he knew which revenue agents could be taken care of and that Simon was one of them (Tr. 648). In April 1957 petitioner told Leonhardt that Simon had agreed to approve the capital gains treatment of the Wickersham transaction for a payment of $5,000, and that Leonhardt was fortunate to get off so inexpensively (Tr. 649). Petitioner indicated that Guterma, who had retained most of

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[2] Leonhardt died before the second trial. The transcribed testimony which he gave at the first trial was read to the jury. See *infra*, p. 9.

the profit from the transaction, would also be brought into the matter (Tr. 649-650). In June petitioner told Leonhardt that his payment to the agent would have to be $25,000, which he should gladly agree to make (Tr. 651). After some discussion, Leonhardt agreed to give Simon $10,000 promptly, and an additional $5,000-$6,000 later, if he could afford it. On September 17, 1957, he gave petitioner $10,000 for Simon (Tr. 652).

Efforts to obtain more money from Leonhardt proved fruitless. Leonhardt testified that in April 1958 he met with petitioner and Simon at petitioner's office. Petitioner expressed his dissatisfaction with Leonhardt's continued failure to pay Simon, and remarked that Guterma had paid much more than the amount previously agreed upon by Leonhardt. Petitioner indicated that any future payments should be made directly to Simon (Tr. 655-656). Thereafter, Simon continued to press Leonhardt for money, but did not receive any additional amounts (Tr. 657).

Guterma and his assistant, Robert Eveleigh, also testified as government witnesses. Guterma stated that, in March 1957, Leonhardt advised him by telephone that his tax return was being audited and it appeared that the agent intended to disallow the Wickersham transaction as a long-term capital gain. Leonhardt assured Guterma that petitioner "was on top of the matter and was handling it in continued conference with the internal revenue agent" (Tr. 283-285). Leonhardt also reminded Guterma of his prior promise to compensate Leonhardt for any tax

liability incurred in the event of a disallowance (Tr. 286-287). One or two weeks later Leonhardt advised Guterma by telephone that he had arranged with Simon to approve the capital gains treatment of the Wickersham transaction for $20,000, and called upon Guterma for reimbursement (Tr. 288-289). The parties engaged in a heated argument, after which Leonhardt agreed to accept a $10,000 reimbursement from Guterma (Tr. 291).

Guterma further stated that, in April 1957, he agreed to meet with petitioner and Simon (Tr. 294). At this meeting Simon declared that he desired a payment of $20,000 from Guterma. Guterma demurred, claiming his agreement with Leonhardt called for a $10,000 payment. He asked Eveleigh to take petitioner and Simon into Eveleigh's office and settle the dispute (Tr. 302). Two hours later, they emerged from Eveleigh's office with an agreement that Simon would receive $10,000 plus 5,000 shares of Shawano Development Corporation stock (Tr. 305). Approximately one week later Guterma gave Eveleigh $10,000 for Simon (Tr. 312). Shortly thereafter Eveleigh advised Guterma that he had given the money and securities to Simon (Tr. 312).

Eveleigh testified that, after Guterma asked him to negotiate the terms of the bribe, a meeting was conducted with Eveleigh, petitioner, and Simon in Eveleigh's office. Simon asked to see Guterma's books of account, which Eveleigh produced (Tr. 1403). After reviewing them, Simon engaged in a discussion with petitioner, following which Eveleigh was advised that

Simon would handle the matter for $20,000 (Tr. 1404). Eveleigh decided that Guterma should be consulted. A conversation was held in Guterma's office between Guterma, Eveleigh and petitioner, resulting in Guterma's reluctant agreement to pay $10,000 (Tr. 1406). When Eveleigh and petitioner informed Simon of the agreement, he expressed dissatisfaction with the amount. He ultimately settled for payment by Guterma of 5,000 shares of Shawano stock in addition to the money (Tr. 1407-1408). About a week later, the parties again met in Eveleigh's office. Eveleigh had $10,000 (which he had received from Guterma) and the stock to give to Simon. Prior to the effectuation of payment, petitioner left the office, indicating that he did not desire to be present when the exchange was made (Tr. 1417). After payment had been made, Eveleigh called petitioner back into the room, and Simon said to petitioner, "It is all set" (Tr. 1418).

2. Acting under F.B.I. supervision,[3] on October 2, 1961, Leonhardt, carrying a concealed tape recorder, met with petitioner at the latter's office. A substan-

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[3] In July 1961 Leonhardt decided to report the bribery to the F.B.I. Thereafter, he agreed to cooperate with the authorities. On October 9, 1961, Leonhardt met with Simon at Leonhardt's apartment, at which time he turned over $1,250 in marked bills. The incident was filmed, and agents arrested Simon as he left the apartment (Tr. 1249-1253). Subsequently, Simon pleaded guilty to three counts of bribery, and was sentenced to imprisonment for concurrent terms of eighteen months and fined $2,000 (Tr. 1280). At petitioner's second trial the court barred the showing of the Leonhardt-Simon film (Tr. 1247).

tial portion of their lengthy conversation was recorded, and the recording was subsequently transcribed. Four days later, petitioner and Leonhardt conversed briefly by telephone, and this conversation was also recorded. At petitioner's first trial, the government did not examine Leonhardt about either recorded conversation. After his direct testimony, petitioner moved for the production of all pertinent statements pursuant to 18 U.S.C. 3500. Government counsel turned over a large number of statements, but declined, however, to give defense counsel the transcriptions of the Leonhardt-Birnbaum conversations of October 1961. The trial judge, after an *in camera* inspection, determined that there was no occasion to order the production of the transcripts dealing with the recorded conversations. Petitioner's counsel did not cross-examine Leonhardt with respect to the October conversations about which petitioner, as a party thereto, had knowledge.[4] However in closing argument at that trial, his counsel commented (1 Tr. 1542):[5]

> You remember that he [Leonhardt] said that he had been able and had kept up the personal relationship and that he was friendly with Simon, who he said had reported to him, Leonhardt, that Birnbaum had shared in the bribe. That's

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[4] As noted by the court of appeals in denying the petition for rehearing (Pet. App. B), petitioner knew at trial that the conversations had been recorded.

[5] The transcript of the first trial has been filed with the Clerk of this Court.

> what he said, and he had no hesitancy in saying it, but he never testified at any time in any conversation that he had said anything to Saul Birnbaum about such participation, and the reason he didn't was because even he couldn't swallow that much despite the fact that the garbage which he and Guterma and Eveleigh poured into the cans in which they sought to make an incinerator of this man's [Birnbaum's] reputation almost reached the level of indecency and beyond the credibility of man.
>
> You know very well that had there been such a conversation with Saul Birnbaum it would have been brought to your attention, and you know very well that the reason there was not such a conversation with Birnbaum was because it never happened.

On his first appeal petitioner raised as error the failure of the court to order the production to the Leonhardt-Birnbaum tapes. The court of appeals, while reversing on other grounds,[6] discussed this claim, and concluded that the trial judge's ruling was not clearly erroneous (337 F.2d at 498, cited in its second opinion, Pet. App. A 29). On this point the court there said:

> We have examined the transcripts of the conversations and despite appellant's argument that lack of mention of the earlier Simon-Leonhardt

[6] Reversal of the first conviction was based on the improper admission of a portion of Leonhardt's testimony found to be inadmissible as a hearsay statement of Simon's remarks (see Pet. App. A 29, n. 18). That portion was deleted from the testimony read to the jury at the second trial.

> conversations in itself could have proved valuable for impeachment purposes, we are unable to agree that the trial court's ruling can be fairly characterized as clearly erroneous. This determination does not mean that on a new trial when the facts may be developed in a different manner, a different position should not be taken and that the trial judge may not exercise his discretion in a different manner.

Leonhardt died before the commencement of petitioner's second trial. Prior to trial a district court judge (who did not preside at either trial) ordered that the transcripts of the Leonhardt-Birnbaum conversations be presented to defense counsel. The second trial judge allowed the government, over petitioner's objection, to introduce in evidence the transcript of Leonhardt's testimony at the first trial. Petitioner subsequently introduced the Leonhardt-Birnbaum conversations in evidence (Tr. 1747-1819), and argued their contents to the jury, stressing the fact that Leonhardt had not, in such conversations, mentioned the bribery of Simon (Tr. 1877).

ARGUMENT

1. Taking issue with the ruling on the prior appeal from his first conviction that it was not clearly erroneous for the trial judge to decline to turn over the recordings of Leonhardt's conversations with petitioner in October 1961, petitioner argues that such error so infected the cross-examination of Leonhardt at the first trial that it was improper to permit Leonhardt's testimony at the first trial to be used at the

second trial after Leonhardt's death. However, whether or not the recordings should have been turned over at the first trial, there was no error in admitting Leonhardt's testimony at the second trial. The October 1961 conversations, to which no reference was made in the government's case at either trial, had no direct bearing on the question of whether petitioner participated in the bribery of Simon in 1957 and 1958. Leonhardt was thoroughly cross-examined at the first trial with respect to his testimony directly relating to that issue, with the aid of all the material produced under 18 U.S.C. 3500. The 1961 recordings had only tangential bearing on the matters importantly at issue, *i.e.*, only to the extent that the defense could point out that, although cooperating with the government in 1961, Leonhardt did not, in the conversations with petitioner, accuse petitioner of participating in the bribery of Simon. At the trial which is presently under review, the defense could and in fact did bring out that fact, getting all possible impeaching value out of the recordings. The defense was allowed to put the recordings before the jury even though Leonhardt was not available to give any explanation he might have been able to offer with respect to his failure to accuse petitioner in those conversations. Under these circumstances, there was no reason not to apply the general rule permitting use of testimony given by a deceased witness at a prior trial.

This case is not, as petitioner assumes, governed by the ruling in *Dennis* v. *United States*, 384 U.S. 855,

868, n. 13, where, in holding that minutes of grand jury testimony should have been turned over to the defense, the Court noted that since, as to one witness, the omission to require production of his grand jury testimony could no longer be remedied, his prior trial testimony would no longer be available to the government. The grand jury testimony there at issue related directly to the events about which the witness testified for the government on direct examination and its usefulness rested on the extent to which the witness could be cross-examined on the basis thereof. Here, as we have shown, the recordings related neither to any direct testimony given by Leonhardt nor to the events at issue at the trial. Nor were the defendants in *Dennis* even generally aware of the substance of the deceased witness' grand jury testimony, unlike petitioner, who was a participant in the recorded conversations (see Pet. App. B 4, n. 1). Even assuming *arguendo* that the recordings should have been turned over at the first trial, the omission was effectively remedied at the second trial. The instant case thus essentially turns on its own particular facts, which are markedly different from those presented by the *Dennis* situation.[7]

2. The fairness of the court's instructions must, as petitioner admits, be judged in the context of the whole charge. When so read, we submit, the majority of the court below properly concluded

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[7] Similarly, the court of appeals' decisions cited by petitioner (Pet. 19-22) are quite plainly distinguishable (see Pet. App. B 2).

that the charge was not unfair, either in intent or in effect. The trial judge fulfilled his duty to "fairly and impartially state the issues and applicable law in logical sequence and in the common speech of man" so that the jury could "understand the issues and intelligently apply the law." *Elbel* v. *United States*, 364 F.2d 127, 134 (C.A. 10), certiorari denied, 385 U.S. 1014.[8]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

JULY 1967

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[8] Petitioner's reference to government counsel's suggesting that the judge modify the language of one comment (Pet. 10) ignores the fact that subsequently, at the hearing on petitioner's sentence, counsel noted that he had misinterpreted the meaning of the questioned comment, and acknowledged his mistake as to any possible implications it might have had detrimental to the defendant (Tr. 2151-2152).

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SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 195

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITIONER'S REPLY

BEN HERZBERG,
HAYS, SKLAR & HERZBERG,
Attorney for Petitioner,
200 Park Avenue,
New York, New York 10017.

Of Counsel
DAVID W. PECK
BEN HERZBERG

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PETITIONER'S REPLY

A reply brief is indicated here because the government's brief is one of confession and avoidance. And this reply is addressed to the attempted avoidance.

The government does not contest our position that Jencks Act material was erroneously denied Birnbaum on the first trial, or that the Court should lay down the applicable harmless error rule in the form that we urged (Pet. pp. 11-22). Instead, the government tries to get away from the Jencks Act and appears to argue that the case presents an issue as to when testimony of a deceased witness may be admitted upon a second trial. As a make-weight, the prosecution also asserts that the Jencks Act material here—which undeniably bore importantly on the credibility of Birnbaum's principal accuser and was consequently important material for defense counsel to have had at hand for cross-examination—"had no direct bearing

on the question of whether petitioner participated in the bribery of Simon" and had only "tangential bearing" on the issues (Govt. Br. p. 10).

To deal briefly with the second contention first, we find complete unreality in the effort to separate the credibility of testimony from the testimony itself, and in the related argument, which is that only a witness' accusatory statement has a "direct" bearing on the case and that all else that tests the believability and truthfulness of the testimony is tangential, with the implication that a defendant may be properly denied cross-examination as to such testing material.

The first contention, involving the effort to deny that this case presents an important Jencks Act point, is clearly wrong. If Birnbaum was erroneously denied Jencks Act material for cross-examination of Leonhardt on the first trial, that error affected the second trial, on which the testimony was read, and it was error to admit Leonhardt's testimony. The principal purpose served by the command of the Sixth Amendment, that the defendant be confronted by the witnesses against him, is to enable his counsel to cross-examine the witnesses [*Mattox* v. *United States,* 156 U. S. 237, 242-44 (1895)].

The prior testimony of a deceased witness would be inadmissible hearsay and a violation of the Constitutional right of confrontation if, through no fault of the defendant, the witness had not been fully cross-examined on the first trial [*Pointer* v. *Texas,* 380 U.S. 400, 406-08 (1965); *Motes* v. *United States,* 178 U.S. 458, 467, 470-72 (1900); *Young* v. *Valentine,* 177 N.Y. 347, 357, 69 N.E. 643, 646 (1904); 5 *Wigmore on Evidence,* 3d ed., sec. 1390, pp. 109-12 (1940)]. Two results follow one from the other:

if cross-examination is improperly limited, the conviction upon the first trial cannot stand [*Alford* v. *United States,* 282 U.S. 687 (1931)], and if the first conviction was reversed, as here on other grounds, the testimony of the witness (as to whom there was not a full opportunity for cross-examination) is inadmissible upon the subsequent trial (*Pointer* v. *Texas* and the other authorities just cited).

There is another way of looking at the matter with the same consequence. The reason, of course, for reversing a conviction for the improper denial of Jencks Act material is that the defendant was denied the opportunity for full cross-examination that the original *Jencks* case (353 U.S. 657) and the subsequent Jencks Act entitles the defendant to [*Rosenberg* v. *United States,* 360 U.S. 367, 374-77 (1959)—Brennan, J., dissenting; *Clancy* v. *United States,* 365 U.S. 312, 316 (1961)]. If upon the first Birnbaum appeal Judge Moore had properly held that the conviction was reversible for the denial of Jencks Act material (as well as for other reasons), there can be no question that Leonhardt's testimony would have been inadmissible on the second trial after his death. There have been cases where a prosecutor has misled the court upon the second trial into making that error and the convictions on the second trial were promptly reversed [*State* v. *Halsey,* 34 N.M. 223, 225-26, 279 Pac. 945, 946-47 (1929); compare *Gill* v. *State,* 148 Texas Cr. 513, 514-15, 188 S.W. 2d 584, 585 (1945) with *Gill* v. *State,* 147 Texas Cr. 392, 393-94, 181 S.W. 2d 276, 277 (1944)]. What the government is attempting to do here is to try to take advantage of the error committed on the first appeal which we could not bring to the attention of this Court because of the reversal on other grounds. It will be appreciated, then, that

no matter how the question is viewed, whether from the standpoint of the first trial or the second, the issue is the same: was Birnbaum denied the right to full cross-examination of Leonhardt upon the first trial.[1]

The government's brief also attempts to distinguish this Court's recent decision in *Dennis*, 384 U.S. 855 (1966), which in itself is dispositive of this case. There the Court held first, that grand jury testimony of government witnesses should have been produced (by analogy to the Jencks Act) and the conviction could not stand, and second, that since one of the witnesses had died after the first trial, his testimony could not be received upon a subsequent trial, since he was no longer available for cross-examination (384 U.S. at 868, note 13). It is because the production of Jencks material (and grand jury minutes, by analogy) upon the first trial is so intimately related to the admissibility of the testimony upon the second that

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[1] At one point counsel suggests (p. 10) that Birnbaum was advantaged by the government's refusal to produce the recording on the first trial, because he received it on the second when Leonhardt was no longer available to explain his failure to bring up any of the charges against Birnbaum during the meeting that was set up at the suggestion of the FBI and while Leonhardt carried a secret tape recorder (347a, D1-3). Whether Birnbaum was advantaged or not is impossible to say unless one knows whether Leonhardt would have squirmed if the recording had been produced on the first trial and he had been confronted with it. It is obvious that the prosecutor did not think Leonhardt would carry the situation off very well, because he refused to produce the recording while Leonhardt was alive.

Moreover, as *Mattox* noted (156 U.S. at 242-44), one of the purposes served by the constitutional requirement of confrontation is that it enables a jury to observe the witnesses against the defendant as they testify. That advantage is lost whenever the testimony of a deceased witness is admitted upon a second trial, and in that event all the jury has to gauge the witness is his previous cross-examination. If anything, the lack of full cross-examination is more serious upon the second trial than it was on the first when at least the jury could observe the witness.

this Court passed so easily and naturally from the one conclusion to the other.

In its attempt to distinguish *Dennis*, the prosecution now says, first, that the grand jury testimony there related "directly" to the events upon which the witness (Mason) testified for the government, while here the Jencks Act material went only to Leonhardt's credibility (Govt. Br. p. 11). It is not true, in the first place, that the excluded material did not relate directly to testimony that Leonhardt gave in his direct examination, as we pointed out in our petition (p. 16). But even if the recorded statement that was not produced related only to Leonhardt's credibility, it would make no difference. Here Birnbaum had taken the stand against his accusers, of which the principal one was Leonhardt (Pet. p. 5-6). The issue here, as in all such cases, where the witnesses for the Government are buying their freedom, is whether the accusers or the defendant are to be believed. There is nothing "tangential" about that issue. We developed, and we will not burden the Court with repetition of, the highly significant respect in which the excluded material bore upon Leonhardt's credibility (Pet. pp. 8-9)—a point that is not denied by the government in its brief.

As everyone familiar with cross-examination knows, it is seldom that one can elicit from a witness a direct contradiction of his testimony in chief, and what a cross-examiner hopes to do is to expose the incredibility of the witness to the jury, by his evasiveness, his hesitancy, and everything else that goes to credibility. To deny a defendant the right to material which goes to a witness' credibility is to deny him the right to cross-examine. That this Court early recognized in holding that material is

"related" to a witness' direct testimony within the meaning of the Jencks Act if it goes to his credibility [*Rosenberg* v. *United States, supra*—360 U.S. at 370; also, *United States* v. *Borelli*, 336 F.2d 376, 393 (2nd Cir. 1964)].

Second, it is said that, unlike Dennis, Birnbaum was a party to the conversation that was the subject of the Jencks Act recording (Gov. Br. p. 11). How this would make any difference is not stated; so we can only surmise that it is suggested that Birnbaum's presumed recollection of a long conversation that took place two years before the trial was the "equivalent" of his having the recording with which to confront Leonhardt. The recording here ran 45 printed pages (350-95a) and its approaches absurdity to suggest that Birnbaum's recollection of such a conversation was the equivalent of having a record with which to confront Leonhardt. We have already dealt with the contention that the production of the recording on the second trial was the equivalent of having the recording available for cross-examination on the first, and with the related argument as to the summation of Birnbaum's counsel on the first trial (Pet. pp. 16-19).[1]

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[1] In advancing the contention counsel incidentally misstate the record in saying that on the second trial, Birnbaum introduced the transcript of the conversation (Govt. Br. p. 9). The facts are that the government opposed the production of the recording before the second trial, that after the district court directed its production counsel for Birnbaum had a chance to study it and unsuccessfully moved to exclude Leonhardt's testimony on the second trial. Then the government—knowing that the defense would want at least to have the transcript before the jury—offered the record itself as Government Exhibit 27 (384a). In doing that, the prosecution followed the classic tactic of trying to minimize a document that it knows the other side will want to introduce.

The prosecution devotes much of its brief to painting a black factual picture. It is always easy to do that by citing only the testimony of a defendant's accusers, whose credibility is the central issue in the case. The government also asserts, in closing its brief, that this case "turns on its own particular facts" (p. 11). On the contrary, the case raises principally the proper harmless error rule to be applied in Jencks Act cases and, more particularly, whether the *Chapman* rule should be followed. That's an important question. Moreover, there was nothing uncommon, unfortunately, in the improper refusal of Jencks Act or similar material on the first trial followed by the unavailability of the witness on the second. The same situation occurred in *Dennis*.

We also urged this Court to grant certiorari because of the improper charge given by the trial judge to the jury (Pet. pp. 3, 9-11, 22-23). In the opposing brief, counsel does not attempt to defend any of the thoroughly objectionable statements in the charge to which Chief Judge Lumbard called attention in his dissenting opinion below (A 33-39) or the one that we thought was so bad that it was enough to mention it alone in our application for certiorari (p. 10). All counsel says is that the charge must be read as a "whole" (pp. 11-12). If by that he means that other parts of the charge corrected the errors, that is not true, and if he means that the whole leaves a less bad taste than the quoted parts, that point—if it is material—

can only be determined if this Court reads the whole charge which runs 56 pages (425-80a).[1]

The petition for certiorari should be granted.

Respectfully submitted,

BEN HERZBERG,
HAYS, SKLAR & HERZBERG,
Attorney for Petitioner,
200 Park Avenue,
New York, New York 10017

Of Counsel
DAVID W. PECK
BEN HERZBERG

August 16, 1967

[1] In our petition we observed that the prosecutor himself was so alarmed by what Judge Irving Ben Cooper said that he asked the court, before the jury retired, to correct the charge, but without avail (Pet. p. 10). Now counsel say in a footnote (p. 12) that after the verdict and upon the sentence, the prosecutor sought to withdraw and minimize the earlier and spontaneous expression of alarm at the charge. We have no doubt that he regretted that the transcript recorded that earlier expression.